



1973

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James A. Shellenberger

Richard B. Hardt

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Recommended Citation

James A. Shellenberger & Richard B. Hardt, *Legislative Conflicts of Interest - An Analysis of the Pennsylvania Legislative Code of Ethics*, 19 Vill. L. Rev. 82 (1973).

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COMMENTS

LEGISLATIVE CONFLICTS OF INTEREST — AN ANALYSIS OF THE PENNSYLVANIA LEGISLATIVE CODE OF ETHICS

"[T]he best security for the fidelity of mankind is to make their interest coincide with their duty."¹

I. INTRODUCTION

Governmental, and particularly legislative, conflicts of interest constitute "an evil which endangers the very fabric of a democratic society."² Citizens are entitled to have absolute confidence in the integrity of their elected representatives and public officials,³ and Americans have traditionally demanded the highest standards of their public servants in this respect.⁴ In order to assure that integrity and concomitant public confidence, situations which create potential conflicts of interest, as well as actual misconduct, must be avoided (1) to eliminate temptations that might affect performance of official duties,⁵ and (2) to prevent the appearance of impropriety.⁶ At the same time, however, there is a very real need for qualified public serv-

1. THE FEDERALIST No. 23, at 437 (Mentor ed. 1961) (A. Hamilton).

2. United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1960).

3. See, e.g., Legislative Code of Ethics § 2(1), PA. STAT. ANN. tit. 46, § 143.2(1) (1969).

4. What constitutes acceptable business practices often appears unethical in the public mind when government officials are involved. See Eisenberg, *Conflicts of Interest Situations and Remedies*, 13 RUTGERS L. REV. 666, 669-70 (1959).

5. See, e.g., Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U.L. REV. 299, 301 (1965); Note, *State Conflict of Interest Laws: A Panacea for Better Government?*, 16 DEPAUL L. REV. 453, 455 (1967). Since the primary concern of conflicts of interest legislation is to prevent the potential for conflict between the governmental employees' public and private interests, such legislation is directed more at the "level of objective circumstances creating a risk of misconduct rather than to the level of subjective misconduct." Buss, *supra*, at 301-02. As a result, the scope of such legislation is often broader than might be necessary for the prevention of actual abuses, and this breadth may discourage competent "innocent" persons from public service. See note 7 *infra*.

6. The concern for public appearance is obvious from the various formulations that have been advanced in an attempt to define a "conflict of interest." Perhaps the best of these is that:

[W]henever the interest of the public official in the proper administration of his office clashes, or appears to clash with the official's interest in his private affairs, a conflict of interest arises.

Krasnow & Lankford, *Congressional Conflicts of Interest: Who Watches the Watchers?*, 24 FED. B.J. 264, 266 (1964), quoting THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMM. ON THE FEDERAL CONFLICT OF INTEREST LAWS 3 (1960). Of course, the subtleness and complexity of many conflict situations, the so-called "gray" areas, render impossible any attempt at enunciating a precise, comprehensive definition which is not so general as to be meaningless. For example, there are always problems of defining "interests," public or private, and in determining the precise point at which they become incompatible.

ants, and any attempt to regulate governmental conflicts of interest must be tailored so as not to deter qualified individuals from entering public service.⁷

The need to balance the promotion of public confidence and governmental integrity against the facilitation of recruitment of competent public servants is particularly acute with respect to state legislators. In most states, the state legislator serves on a part-time basis for a salary which alone is generally insufficient to support his family.⁸ That plus the legislator's uncertain tenure almost requires him to have an alternative means of support available. Accordingly, state legislators often have found it necessary to secure employment and other sources of income outside of government. Often these outside activities, such as private legal practice, have a natural proclivity toward involvement with the state. Unfortunately, a blanket proscription of such outside employment may exclude many able citizens from government service, and create a "further narrowing of the occupational classes from which legislators will be drawn."⁹

In addition, there is a fundamental policy question concerning the extent of the "disinterest" which may properly be demanded of the framers of government. While most modern commentators have supported increasing the professionalism of state legislators, Lord Bryce once commended America for the number of essentially private individuals in its government, something he considered far superior to government by "mere professionals."¹⁰

Besides restricting the recruitment of able public servants, conflict of interest legislation may have a dysfunctional effect on the legislative process as a whole. It contradicts the rationale of representative government to attempt to divorce public officials from the pressure and influence of their constituents. Furthermore, in an era of ever-increasing governmental regulation of the private sector, it is, perhaps, unrealistic and

7. It is widely acknowledged that, in drafting conflicts legislation, a balance must be struck between the dual objectives of promoting actual and apparent governmental integrity and of facilitating the recruitment of public officials and employees. See, e.g., Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113 (1963); Comment, *State Legislative Conflicts of Interest: An Analysis of the Alabama Ethics Commission Recommendation*, 23 ALA. L. REV. 369 (1971); Note, *State Conflict of Interest Laws: A Panacea for Better Government?*, 16 DEPAUL L. REV. 453 (1967); Note, *Conflicts of Interest of State Legislators*, 76 HARV. L. REV. 1209 (1963); Note, *Conflicts of Interest of State and Local Legislators*, 55 IOWA L. REV. 450 (1969); Note, *Conflicts of Interest: A New Approach*, 18 U. FLA. L. REV. 675 (1966). One commentator has noted that "it can be said almost as a truism, that conflict-of-interest legislation is successful to the extent that it prohibits dangerous conflicts without discouraging public service." Buss, *supra* note 5, at 302.

8. See, e.g., Note, *Conflicts of Interest of State and Local Legislators*, 55 IOWA L. REV. 450 (1969).

In Pennsylvania the problem of minimal legislative compensation is not as severe as in many states. The Pennsylvania legislator receives \$15,600 per year plus expenses and retirement benefits. PA. STAT. ANN. tit. 46, § 5 (Supp. 1973).

9. Note, *Conflicts of Interest of State Legislators*, 76 HARV. L. REV. 1209, 1210 (1963).

10. 2 J. BRYCE, *THE AMERICAN COMMONWEALTH* 69 (3d ed. 1901). A more recent analysis has also led to the conclusion that "[o]ften times the outside private interest proves 'useful in both providing information and perspective to the problems of legislating and administering.'" Note, *supra* note 5, at 454.

unwise not to expect and to allow private interests to participate in the lawmaking process.¹¹ Indeed, the right of citizens to petition their government is fundamental and guaranteed by the first amendment.¹²

Just as that right of access to the legislative process is central to effective representative government, so too is what has been termed the constituency service role of the legislator.¹³ In the American scheme of government, a citizen's best recourse, when dealing with government, is his elected representative who will, by virtue of his elected status, be most responsive to his demands. Thus, "historically a legitimate function of the legislator has been assistance to his constituents in their dealings with state governments."¹⁴

With the difference between expected legislative behavior and criminal activity being generally a matter of degree, attempts to assure legislative right conduct through common law sanctions and general criminal statutes have met with meager success. Those approaches suffer from sporadic enforcement and provide only vague, general standards affording the legislator little or no guidance.¹⁵ Accordingly, the current trend is to handle the problem through separate legislative enactments which deal directly with the problem of legislative conflicts and contain either criminal prohibitions, general standards of conduct, or both.¹⁶ Consistent with this trend, the Pennsylvania general assembly, in 1968, enacted the Legislative Code of Ethics (the Code)¹⁷ for the express purpose of protecting public

11. *Why the Corporate Lobbyist is Necessary*, BUS. WEEK, Mar. 18, 1972, at 62.

12. This proposition assumes, of course, that the first amendment "right of the people . . . to petition the Government for a redress of grievances . . ." includes the right to petition an individual legislator as well as the legislative body. U.S. CONST. amend. I. While there is little authority on this possible distinction, the understanding upon which lobbying tactics have become universally accepted in the federal and state legislatures has been that individuals do enjoy a right of access to the individual legislators that represent them. *See generally*, A. HOLTZMAN, INTEREST GROUPS AND LOBBYING (1966). While the stringent regulation of legislative behavior in the interest of promoting greater integrity in office would not necessarily restrict a citizen's right to petition, such a right, if recognized, might act to preclude an attempt to solve the problem by simply restricting contacts between individual legislators and private citizens.

13. C. CLAPP, *THE CONGRESSMAN: HIS WORK AS HE SEES IT* (Anchor ed. 1964).

14. Note, *supra* note 9, at 1228.

15. *See* Note, *supra* note 9, at 1211-21; Note, *supra* note 8, at 451-55.

16. Among the states with recent legislation on the problem of governmental conflicts of interest generally, or legislative conflicts in particular, are Arizona, ARIZ. REV. STAT. ANN. §§ 41-1291 to -1297 (Supp. 1972), Florida, FLA. STAT. ANN. §§ 112.311 to .319 (Supp. 1972), Illinois, ILL. STAT. ANN. ch. 127, §§ 601-101 to -101 (Smith-Hurd Supp. 1972), Kansas, KAN. STAT. ANN. §§ 75.4301-.4307 (Supp. 1972), Louisiana, LA. REV. STAT. ANN. §§ 42:1141-1148 (Supp. 1972), Massachusetts, MASS. GEN. LAWS ANN. ch. 268A (Supp. 1972), New Jersey, N.J. REV. STAT. §§ 52:13D-1 to 52:13D-11 (1970), New York, N.Y. PUB. OFFICERS LAW §§ 73, 74 (McKinney Supp. 1972), Texas, TEX. REV. CIV. STAT. ANN. art. 6252-9 (Supp. 1972), and Washington, WASH. REV. CODE ANN. §§ 42.22.010-.120 (Supp. 1971).

17. Legislative Code of Ethics §§ 1-8, PA. STAT. ANN. tit. 46, §§ 143.1-8 (1969). This Code is set forth in an appendix to this Comment.

confidence, providing legislators with guidance in gray areas, and curbing tendencies for exploitation of legislative office.¹⁸

The purpose of this Comment is to analyze the Pennsylvania Code in order to ascertain its probable effectiveness in dealing with the problem of legislative conflicts of interest. Initially, the basic outline and nature of the Code will be discussed, followed by an analysis of its substantive, remedial, and enforcement provisions. An attempt will be made to indicate the probable meaning and scope of the Code provisions, bearing in mind the objectives discussed above, as must be done in any attempt to interpret or construe conflicts legislation.¹⁹ Finally, the provisions of the Code will be compared to the conflicts legislation of other states, and proposals for more effective regulation in Pennsylvania will be submitted where appropriate.

Analysis of the substantive provisions of the Code has been structured to facilitate examination of the manner in which the statute deals with the basic conflicts situations. Accordingly, that section of the Comment has been subdivided by conflict situation, not by Code provision, and the sections of the Code which touch upon each conflict situation have been examined together. Due to the obvious overlapping of several of the Code provisions, it has been necessary to discuss them in more than one subdivision.

II. OUTLINE AND NATURE OF THE PENNSYLVANIA LEGISLATIVE CODE OF ETHICS

Pennsylvania has attacked the problem of legislative conflicts of interest directly — the Legislative Code of Ethics is a separate act which applies solely to state legislators.²⁰ As a "communication of warnings and expectations,"²¹ stipulating proper official conduct, and including criminal

18. Legislative Code of Ethics § 2(4), PA. STAT. ANN. tit. 46, § 143.2(4) (1969).

19. See, e.g., Buss, *supra* note 5, at 375.

20. Actually, the Code's coverage is broader than simply legislators for it applies to "members" which "shall include a Senator, Representative, officer or employee of the General Assembly or any committee thereof; but not a person employed on a contractual basis or without compensation for a particular project." Legislative Code of Ethics § 3(6), PA. STAT. ANN. tit. 46, § 143.3(6) (1969). Although the fact that employees and officials of the legislature, other than the legislators themselves, are not elected representatives insulates them from many of the special conflicts problems concerning legislators, such employees' interests and duties are closer to those of the legislative than other branches of government, thus justifying their inclusion within the separate legislative code. Throughout this Comment the terms "member" and "legislator" will be used interchangeably unless the context indicates otherwise.

Also, some differentiation between "special employees" and "full-time" officials and employees has been deemed rational and necessary, at least on the federal level. Perkins, *supra* note 7, at 1163. However, it is arguable that employees on a contractual basis or without compensation should not be totally excluded from conflicts regulations because of the very real temptation or opportunities for abuse which exist for them. See Holifield, *Conflicts of Interest in Government — Contractor Relationships*, 24 FED. B.J. 297 (1964). While Pennsylvania excludes such employees from all the restrictions of the Code, other statutes restrain the activities of special employees, though not as much as those of full-time officials. See, e.g., 18 U.S.C. §§ 201, 219 (1970); MASS. GEN. LAWS ANN. ch. 268A, § 4 (1970) <https://www.legis.state.ma.us/leginfo/?id=99&vol=9&iss=1/2>.

21. Note, *supra* note 5, at 462.

prohibitions, the Code is clearly a step forward from the sporadic and inconsistent application of common law sanctions to the problem.

The Code is a relatively short statute containing only eight sections, the first three of which provide the short title of the act,²² legislative findings and a declaration of policy,²³ and definitions.²⁴ Section 4 of the Code²⁵ is captioned "Standards of Conduct" which, although expressed as prohibitions, are merely broad statements of principle. The standards are hardly extensive and are somewhat repetitive of other provisions of the Code. Section 4(1) prohibits a legislator from accepting outside employment which will require him to disclose confidential information,²⁶ while section 4(2) mandates that the member shall refrain from disclosing such information and from using it to further his personal interests.²⁷ The latter provision substantially duplicates the criminal prohibitions contained in section 5(f) and (g).²⁸ Section 4(3) merely forbids the use of official position for the securing of unwarranted privileges or exemptions.²⁹ This standard is so broad that it encompasses all, or almost all, of the major conflict of interest situations.

In contrast to section 4, section 5 of the Code³⁰ contains prohibitions which specifically define and forbid certain activity or conduct and which are enforceable by means of criminal sanctions under section 6.³¹ Section 5(a) prohibits the knowing receipt of any gift or compensation, except from the state, which is intended to or which would influence the member's performance of his official duties, and also forbids compensated lobbying and voting.³² Although the provision alone is quite broad, its scope is limited by several of the exceptions contained in section 5(e). Section 5(b) attacks part of the confidential information problem by prohibiting the receipt of compensation for consultation with respect to general assembly matters, or which draws upon confidential information.³³ This prohibition is partially duplicative of the more general prohibitions of sections 5(f) and (g) against the use and disclosure of confidential information which, unlike section 5(b), are unaffected by the section 5(e) exceptions. The problem of self-dealing by a legislator is governed by section 5(c) which

22. Legislative Code of Ethics § 1, PA. STAT. ANN. tit. 46, § 143.1 (1969). The complete text of the Legislative Code of Ethics is set forth in an appendix to this Comment.

23. Legislative Code of Ethics § 2, PA. STAT. ANN. tit. 46, § 143.2 (1969). Since this preamble contains a statement of the legislative purpose in enacting the Code, it is of prime importance in interpreting and construing the statute.

24. Legislative Code of Ethics § 3, PA. STAT. ANN. tit. 46, § 143.3 (1969). The definitions contained in section 3 of the Code will not be examined separately but will be referred to during the discussion of the substantive and remedial provisions of the act.

25. PA. STAT. ANN. tit. 46, § 143.4 (1969).

26. *Id.* § 143.4(1).

27. *Id.* § 143.4(2).

28. *Id.* §§ 143.5(f), (g).

29. *Id.* § 143.4(3).

30. PA. STAT. ANN. tit. 46, § 143.5 (1969).

31. *Id.* § 143.6.

32. *Id.* § 143.5(a).

33. *Id.* § 143.5(b).

restricts the member's freedom to participate in any state transaction in which he is substantially, personally, and economically interested.³⁴ Section 5(d) requires that the legislator file an information disclosure statement as a condition to his rendering assistance to outsiders in state transactions for profit.³⁵ This provision constitutes the sole disclosure requirement of the Code, and is the only section directly applicable to the outside assistance situation. The final two criminal prohibitions of section 5, sections 5(f) and (g), forbid, as was mentioned above, the use and disclosure of confidential information by the member.³⁶ They are the fourth and fifth provisions of the Code aimed at the confidential information situation. Notably absent from the Code are express restrictions on extra-legislative employment, the activity of former legislators, and, most importantly, private interest in a state contract.

An examination of these substantive provisions in the abstract reveals that while they overlap in parts, the focus of each provision is quite different. Section 5(c) proscribes those transactions in which the legislator has a personal economic interest and attempts to act as a principal in an official capacity, with participation as an official being the gist of the offense.³⁷ The prohibition would apply to a member acting in his private capacity or for a private party only when he is also participating as a public official.³⁸ Section 5(a) also touches upon the legislator's performance of his official duties in that it prohibits the receipt of gifts and compensation which would influence such performance or which are given in exchange for his lobbying or voting efforts. However, involvement as a government official is an element of the offense only in the compensated voting situation and not generally, as under section 5(c).³⁹ Sections 5(b), (d), (f) and (g), on the other hand, do not require any official activity by the member, although sections 5(b), (f) and (g) concern the legislator's official conduct in the sense that the information, the use, disclosure, or consultation with respect to which is proscribed by those sections, is that which is obtained by the member as a result of his official position.⁴⁰ These prohibitions are aimed solely at the member's private activity and forbid such activity when it is either for his own benefit, in the case of section 5(f),⁴¹ or for the benefit of himself and other private parties, in the case of sections 5(b), (d), and (g). Even with respect to the latter three provisions there is a large difference in scope. Under 5(g) the prohibited conduct is merely disclosure of certain

34. *Id.* § 143.5(c).

35. *Id.* § 143.5(d).

36. *Id.* §§ 143.5(f), (g).

37. "Participate," as defined by the Code, "means to take part in State action or a proceeding personally as a Commonwealth official." Legislative Code of Ethics § 3(8), PA. STAT. ANN. tit. 46, § 143.3(8) (1969).

38. Legislative Code of Ethics § 5(c), PA. STAT. ANN. tit. 46, § 143.5(c) (1969).

39. Legislative Code of Ethics § 5(a), PA. STAT. ANN. tit. 46, § 143.5(a) (1969).

40. PA. STAT. ANN. tit. 46, §§ 143.5(b), (d), (g) (1969).

41. *Id.* § 143.5(f).

information to outside parties⁴² while sections 5(b) and (d) require some active aid to outsiders. Moreover, as between sections 5(b) and 5(d), the form of aid prohibited differs in that the former forbids mere consultation where certain governmental information is involved, regardless of whether the state is otherwise affected,⁴³ while the latter applies to a member who actually assists a private party, but only with respect to a state transaction.⁴⁴ Finally, sections 5(a), (b), and (d) require, as elements of the prohibitions, some form of transfer of value from a private party to the legislator, although the form of transfer is not exactly the same under each provision; the section 5(a) prohibition involves the receipt of a gift or compensation,⁴⁵ section 5(b) compensation or a "thing of economic value,"⁴⁶ and section 5(d) merely compensation.⁴⁷ In contrast, section 5(f) mandates that the member obtain some private gain from his use of confidential information, and section 5(g) may have the same requirement with respect to his disclosure of such information, while section 5(c) provides only that the member have some substantial personal economic interest in the transaction in which he participates.⁴⁸

Section 5(e) exempts certain enumerated activities from the applicable provisions of sections 5(a), (b), (c), and (d),⁴⁹ but not from the provisions of sections 5(f) and (g). Among the exempted conduct is the receipt of bona fide reimbursement for otherwise unpaid traveling and subsistence expenses,⁵⁰ acceptance of public service or civic organization awards,⁵¹ and campaign contributions.⁵² These three exceptions apply primarily to section 5(a). Further, section 5(e)(7) exempts from section 5(d)'s disclosure requirement a lawyer-legislator's compensated representation of interests adverse to the state in certain specified proceedings.⁵³ Although the Code contains no direct prohibition of a member's interest in a state contract, there are two exceptions directed specifically at that situation: section 5(e)(4) permits a member to share in compensation received from the state by a "person" pursuant to a contract with the state which is let by competitive bidding,⁵⁴ and section 5(e)(6) allows

42. *Id.* § 143.5(g).

43. *Id.* § 143.5(b).

44. *Id.* § 143.5(d).

45. *Id.* § 143.5(a). Compare Legislative Code of Ethics § 3(5), PA. STAT. ANN. tit. 46, § 143.3(5) (1969), which defines "gift," with Legislative Code of Ethics § 3(4), PA. STAT. ANN. tit. 46, § 143.3(4) (1969), which defines "compensation."

46. Legislative Code of Ethics § 3(11), PA. STAT. ANN. tit. 46, § 143.3(11) (1969), defines "thing of economic value."

47. PA. STAT. ANN. tit. 46, § 143.5(d) (1969).

48. *Id.* §§ 143.5(c), (f), (g).

49. *Id.* § 143.5(e).

50. Legislative Code of Ethics § 5(e)(1), PA. STAT. ANN. tit. 46, § 143.5(e)(1) (1969).

51. Legislative Code of Ethics § 5(e)(3), PA. STAT. ANN. tit. 46, § 143.5(e)(3) (1969).

52. Legislative Code of Ethics § 5(e)(5), PA. STAT. ANN. tit. 46, § 143.5(e)(5) (1969).

53. PA. STAT. ANN. tit. 46, § 143.5(e)(7) (1969).

54. *Id.* § 143.5(e)(4).

the receipt of compensation where the member has a de minimis interest in the recipient, the legislator is the exclusive supplier of property purchased by the state, or the state has purchased newspaper advertising required by law.⁵⁵ Finally, section 5(e)(2) purportedly exempts participation in religious, civic, or political party activities from the criminal prohibitions of subsections (a), (b), (c), and (d).⁵⁶

Section 6 of the Code authorizes the imposition of the criminal penalties of fine or imprisonment upon a member convicted of violating any of the prohibitions contained in section 5.⁵⁷ Moreover, section 7 provides that the civil remedies of rescission or cancellation,⁵⁸ restitution,⁵⁹ and dismissal of the violating member⁶⁰ are available to the state as supplemental sanctions for violations of section 5 and as the sole remedies for violations of the standards of conduct in section 4.⁶¹

Despite the civil remedies of section 7, the Legislative Code of Ethics is essentially a criminal statute, relying heavily upon specific prohibitions with criminal sanctions. While criminal prohibitions are appropriate where unethical conduct can be specifically and objectively defined,⁶² and are still extensively employed in several states,⁶³ it must be recognized that it is impossible to clearly define all of the conflicts situations which can arise. Further, there is an apparent inability and unwillingness to enforce such a criminal statute.⁶⁴

Accordingly, the better approach, and the trend among the states which have faced the problem of legislative conflicts, is to limit the use of criminal prohibitions to those situations in which the proscribed conduct

55. *Id.* § 143.5(e)(6).

56. *Id.* § 143.5(e)(2).

57. *Id.* § 143.6.

58. Legislative Code of Ethics § 7(a), PA. STAT. ANN. tit. 46, § 143.7(a) (1969).

59. Legislative Code of Ethics § 7(c), PA. STAT. ANN. tit. 46, § 143.7(c) (1969).

60. Legislative Code of Ethics § 7(e), PA. STAT. ANN. tit. 46, § 143.7(e) (1969).

The sanction of dismissal or suspension from employment applies only to employees and officials of the general assembly other than legislators. However, pursuant to PA. STAT. ANN. tit. 65, § 121 (1963), a legislator, or any public official, convicted in a court of record of a misdemeanor in office (violation of section 5 of the Code is a misdemeanor under section 6) shall forfeit his office and the sentence imposed upon him is to include a direction of removal from office. In addition, a finding that a legislator had violated the Code would be grounds for impeachment under the Pennsylvania state constitution. PA. CONST. art. 6, §§ 6-7.

61. Section 7 also provides the procedure to be followed in the use of the civil remedies and contains a statute of limitations for an action seeking restitution. PA. STAT. ANN. tit. 46, § 143.7 (1969).

The final section of the Code is a severability clause providing that the holding of any section of the act invalid will not affect the validity of any other section. Legislative Code of Ethics § 8, PA. STAT. ANN. tit. 46, § 143.8 (1969).

62. See, e.g., Comment, *supra* note 7, at 373; Note, *Conflict of Interest of State Legislators*, 76 HARV. L. REV. 1209, 1225 (1963); Note, *Conflicts of Interest of State and Local Legislators*, 55 IOWA L. REV. 450, 456-57 (1969).

63. See, e.g., ARIZ. REV. STAT. ANN. § 41-1297 (Supp. 1971); MASS. GEN. LAWS ANN. ch. 268A, §§ 2-5 (Supp. 1970). The Arizona statute contains only criminal sanctions, while the Massachusetts act does contain a code of ethics with non-penal sanctions, although it is primarily a criminal statute.

64. See, e.g., Note, *Conflicts of Interest: A New Approach*, 18 U. FLA. L. REV. 675, 687-88 (1966). In this respect it is interesting to note that the Pennsylvania Legislative Code has never been enforced by a court of record.

is clearly definable and to rely more on "codes of ethics"⁶⁵ establishing broad guidelines or acceptable standards.⁶⁶ Such codes are desirable because they provide general direction and advance warning to the legislators, enable the state to achieve the objectives of the conflicts prohibition without resorting to the courts and the criminal law in every instance, and increase the scope of the conflicts acts without deterring governmental service.⁶⁷ The Pennsylvania general assembly's attempt to provide such standards of conduct in section 4 is weak at best due to the limited coverage of the section and its partial repetition of section 5's prohibitions. It is submitted that the general assembly should amend section 4, at least outlining the basic principles and policy objectives which underlie the specific criminal provisions of section 5.⁶⁸

However, despite the fact that this aspect of the Code is somewhat lacking in comparison to other states' conflicts legislation, the Pennsylvania approach of regulating legislative conflicts directly through a separate statute is superior to that of the majority of the other states, which include legislators within general enactments governing all public officials and employees.⁶⁹ The Pennsylvania approach is more appropriate in this respect because the singular concerns and problems of state legislators render unsatisfactory any attempt to handle the legislature within the same rules that govern the other branches of government. In addition to the fact that state legislative service is generally part-time,⁷⁰ the legislator's role as the elected representative of his constituents distinguishes him from executive and judicial employees. Separate legislation aimed exclusively at legislative conflicts of interest permits the state to provide for these

65. A "code of ethics," as it is used here, may be defined as:

[A] statement of acceptable standards of behavior for government officials and employees The code of ethics is a mode of communicating, in advance, warnings and expectations to public officials, and at the same time informing the public as to what is acceptable behavior It creates a sense of security for the public and hopefully makes some legislators more aware of the guidelines.

Note, *supra* note 5, at 462.

66. See, e.g., Eisenberg, *supra* note 4, at 671-72; Comment, *supra* note 7, at 373; Note, *supra* note 9, at 1230.

67. See, e.g., Buss, *supra* note 5, at 306-07; Comment, *supra* note 7, at 403; Note, *supra* note 64, at 682.

68. One article discussing the recent federal conflict of interest statute, 18 U.S.C. §§ 201-09 (1970), contains a good statement of the principles underlying conflicts legislation which the general assembly should incorporate into section 4 almost verbatim. Perkins, *supra* note 7, at 1118-22. Moreover, a proposed conflicts statute, based on those of several states, includes a governmental code of ethics with guidelines that are more specific than mere statements of principle, and which can be used as a basis for drafting subsections of section 4 to supplement the broad statement of principles. Note, *supra* note 64, at 690-93.

69. See, e.g., FLA. STAT. ANN. §§ 112.311-319 (Supp. 1972); KAN. STAT. ANN. §§ 75.4301-4306 (Supp. 1972); LA. REV. STAT. ANN. §§ 42:1141-1148 (Supp. 1972); MASS. GEN. LAWS ANN. ch. 268A (Supp. 1972); N.J. REV. STAT. §§ 52:13D-12-27 (Supp. 1972); N.Y. PUB. OFFICERS LAW §§ 73, 74 (McKinney Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 6252-9 (Supp. 1972); WASH. REV. CODE ANN. §§ 42.22.010-.120 (Supp. 1972). Among those few states which, like Pennsylvania, have statutes governing state legislators separately are Arizona, ARIZ. REV. STAT. ANN. §§ 41-1291 to 41-1297 (Supp. 1972) and California, CAL. GOV'T CODE, §§ 8920-8926 (West Supp. 1972).

70. See note 8 and accompanying text *supra*.

special problems and to guide the solon directly, without the need for extensive and often confusing exemptions which have only added to the complexity of general conflicts legislation.⁷¹

Of course, the unification and consolidation of all a state's conflicts laws is a legitimate objective.⁷² Nevertheless, the legislature can, and should, be governed by separate provisions, as has been done in Virginia. The Virginia Conflicts of Interests Act⁷³ is a general statute dealing with all state and local government officers and employees; however, a special section enumerates the standards of conduct applicable to legislators and legislative candidates, creating, in effect a separate act within the act. It is submitted that the Pennsylvania general assembly should give serious consideration to the enactment of legislation in similar form.⁷⁴

III. THE SUBSTANTIVE PROVISIONS OF THE PENNSYLVANIA CODE — ANALYSIS AND COMPARISON

A. Self-Dealing

Self-dealing, or "the act of a public official, taken in his public capacity, in dealing with himself in his private capacity,"⁷⁵ has been justly labeled the most obviously objectionable behavior of a public official.⁷⁶ The evil presented by such conduct is clear. When an official directly participates in governmental activity in which he has a personal interest, the temptation to act, and the risk that he will so act to promote his private interest as against that of the public is great. The appearance presented to the public by such self-dealing is that the official is using his government position to advance his private interests or at least to directly influence government action which affects such interests.⁷⁷ However, the need for

71. See generally the statutes cited in note 69 *supra*.

72. Consolidation, unity, and consistency have been noted as being among the chief accomplishments of the recently enacted federal conflicts of interest statute. 18 U.S.C. §§ 201-09 (1970). Perkins, *supra* note 7, at 1163. In fact, one of the biggest problems with most state conflicts legislation, including that of Pennsylvania, is that it is scattered throughout the statute books and is often inconsistent.

73. VA. CODE ANN. §§ 2.1-347 to -358 (1973).

74. In such an enactment, the various Pennsylvania conflicts prohibitions, at least those applicable to state level employees, could be consolidated in one place instead of being scattered throughout the state statutory codification as is presently the case. Among the statutes which could be moved would be the State Adverse Interest Act, PA. STAT. ANN. tit. 71, §§ 776.1-8 (1962), and the Lobbying Registration Act, PA. STAT. ANN. tit. 46, §§ 148.1-9 (1969).

75. Perkins, *supra* note 7, at 1118.

76. *Id.*

77. The danger created by legislative self-dealing is similar to that involved in representing "outsiders" in dealing with the government. However, in the self-dealing situation, the member's personal interests are directly involved while the connection may be more indirect in the assistance situation. Moreover, while uncompensated aid to or representation of constituents in dealings with the state has been deemed a legitimate and permissible function of a state legislator, Comment, *supra* note 7, at 387; Note, *supra* note 9, at 1228, the legislator's duties cannot include direct service of his own interests. Self-dealing would appear to be the most flagrant contravention of the policy of undivided loyalty to the state and the public. Cf. Buss, *supra* note 5, at 323; Comment, *supra* note 7, at 387-88; Note, *supra* note 64, at 684; Note, *supra* note 9, at 1227.

the legislator to perform his representative function mitigates against absolute prohibition of all forms of self-dealing, partly because a member's personal interests will often coincide with those of his constituents so that he may often be serving his own interests in promoting theirs. As a representative of his community, the legislator is required to serve the community's interest, and often is elected because his interests are the same as those of his electors.⁷⁸

The principle underlying the prohibition of self-dealing, that "[p]ublic officials must disqualify themselves from participating in government action when a particular course of government action may significantly affect their personal economic interests,"⁷⁹ is effectively embodied in the prohibition of section 5(c) of the Pennsylvania Code.⁸⁰ That section prohibits the legislator from participating as a principal in "any transaction involving the Commonwealth or any Commonwealth agency" in which the member, his immediate family (spouse and children), or any "person"⁸¹ with whom he holds a position of employment has a "substantial personal economic interest."⁸²

Section 5(c) operates to restrict the public or official conduct of the member, for it prohibits his "participation," which the Code defines as

78. See Note, *supra* note 5, at 454. A general divestment of financial holdings in the interest of precluding possible self-dealing would be an inordinately burdensome remedy as applied to legislators since, logically, the divestment would have to be almost total. "There are few areas which are not subject to government control as benefited by governmental subsidy." Lee, *Conflict of Interest: One Aspect of Congress' Problem*, 32 GEO. WASH. L. REV. 954, 969 (1964). See notes 7-10 and accompanying text *supra*. When divestment is an impractical approach, disclosure requirements become especially important. See notes 273-99 and accompanying text *infra*.

79. Perkins, *supra* note 7, at 1118 (footnote omitted).

80. PA. STAT. ANN. tit. 46, § 143.5(c) (1969). The self-dealing restriction would also come within the broad standard of conduct provision of section 4(3). PA. STAT. ANN. tit. 46, § 143.4(3) (1969). The complete text of the Legislative Code of Ethics is set forth in an appendix to this Comment.

At least part of the self-dealing problem is governed by the Pennsylvania constitution which provides in pertinent part:

A member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly shall disclose the fact to the House of which he is a member, and shall not vote thereon.

PA. CONST. art. 3, § 13. This provision would foreclose only the most obvious opportunities for self-dealing, but, unfortunately, it has never been enforced by a court of record so that its impact upon the activity of members is questionable at best. However, if article 3, section 13 is enforceable, it is submitted that the phrase "personal or private interest" should be construed as not including an interest of the member and his constituents generally, in order that the legislator's performance of his representative function is not unduly restricted. See Note, *supra* note 5, at 454. See also text accompanying notes 91-92 *infra*.

Finally, section 5(a) of the Code touches upon the self-dealing situation, in the sense that it prohibits the receipt of compensation by a member for lobbying or voting for the passage or defeat of legislation. PA. STAT. ANN. tit. 46, § 143.5(a) (1969). In such a situation, the member's public conduct would be his lobbying or voting, while his private interest would be the compensation received. However, section 5(a) is more directly aimed at the outside gift or compensation situation.

81. See Legislative Code of Ethics § 3(9), PA. STAT. ANN. tit. 46, § 143.3(9) (1969), for the definition of the term "person." "Person" will be placed in quotation marks in this Comment whenever it is being used in the statutory defined sense.

taking any action as a state official.⁸³ The member may still acquire and retain private interests in government transactions if he abstains from participation. Moreover, the prohibition only applies to a member who participates "as a principal," a phrase which, although not defined in the Code, apparently means that the official action taken by the member with respect to the transaction in question must be done personally as one with controlling authority or as a chief.⁸⁴ Such a reading would conceivably permit the legislator to vote on a bill in which he has a substantial personal economic interest. Further, under this interpretation, the legislator might avoid the section 5(c) prohibition merely by delegating his authority with respect to the transaction to another. Indeed, the phrase "as a principle," through *any* possible reading, can only serve to qualify the basic prohibition against official participation which it modifies, and should therefore be deleted.⁸⁵

Under section 5(c), a member is prohibited from participating in "any transaction involving the Commonwealth or any Commonwealth agency." Such a transaction is defined quite broadly and would cover almost every governmental activity in which the state has a significant interest,⁸⁶ including the enactment of legislation.⁸⁷ This would appear appropriate because the evil at which self-dealing prohibitions are aimed

83. Legislative Code of Ethics § 3(8), PA. STAT. ANN. tit. 46, § 143.3(8) (1969).

84. Cf. *id.*; MERRIAM-WEBSTER'S NEW INTERNATIONAL DICTIONARY 1802 (3d ed. 1971).

85. A limitation on the reach of the section 5(c) self-dealing prohibition through a narrow reading of the "as a principle" qualification is not justified by the need to permit the legislator to perform his representative function. That factor is already accounted for in section 5(c)'s definition of the disqualifying personal interest. PA. STAT. ANN. tit. 46, § 143.5(c) (1969). See text accompanying notes 91-92 *infra* and notes 105-06 and accompanying text *infra*.

86. "Transaction involving the Commonwealth" is defined in Legislative Code of Ethics § 3(12), PA. STAT. ANN. tit. 46, § 143.3(12) (1969). "State action" means any action on the part of the Commonwealth or a Commonwealth agency Legislative Code of Ethics § 3(7), PA. STAT. ANN. tit. 46, § 143.3(7) (1969). For the Code definition of "agency," see Legislative Code of Ethics § 3(1), PA. STAT. ANN. tit. 46, § 143.3(1) (1969). Thus, the only governmental activity in which the member could lawfully participate despite his personal interest would be a matter with respect to which he had no reason to believe the state would take any action, or be a party, and in which the state interest was merely indirect or remote.

The requirement that the member must believe or have reason to believe that the State will be involved or directly interested in the matter protects the "innocent" legislator who has no reason to suspect a conflict between his public obligations and his private interests, thereby hopefully reducing the deterrent effect of the prohibition on potential public servants. However, even self-dealing by an "innocent" legislator may present the appearance of unethical behavior and the requirement might be subject to abuse by officials who falsely protest their innocence. Accordingly, a viable ethics committee is necessary to closely scrutinize any claims of lack of belief. See notes 300-19 and accompanying text *infra*.

87. Legislative Code of Ethics § 3(7), PA. STAT. ANN. tit. 46, § 143.3(7) (1969). Of course, the requirement of disqualification from participation in legislative matters duplicates, in part, article 3, section 13 of the Pennsylvania constitution. However, the constitutional provision applies only to bills or measures before the general assembly and requires disclosure as well as abstention, while section 5(c) of the Code covers any transaction before the legislature or a committee thereof and demands only abstention. PA. CONST. art. 3, § 13. See note 80 *supra*.

is much greater than mere voting on legislation in which the legislator has an interest.

In order for the legislator to be required to abstain from participation in a governmental transaction, his interest, or that of his family or private employer, must be a "substantial personal economic" one.⁸⁸ "Personal" is adequately defined in section 5(c) as being an interest other than "that of a general class or general group of persons of which he may reasonably be expected to know,"⁸⁹ thereby protecting the right and duty of the legislator to participate in governmental activities when the interests of his constituents or a group thereof are involved.⁹⁰ Further, the requirement that the personal interest be substantial excludes, as it should, those interests which are insignificant or remote.⁹¹ Any attempt to further define the extent of the disqualifying interest would render the prohibition overly rigid, and further guidance can be provided more effectively on an ad hoc basis. Although non-economic interests may tend to influence the legislator's performance of his public duty,⁹² section 5(c)'s limitation to economic interests is justified by both the difficulty of determining what is a substantial personal non-pecuniary interest and the need to accommodate the member's representative function. A restriction based upon such an interest would be more appropriately handled by a general code of ethics without the need to resort to the criminal law for enforcement.⁹³

Finally, it should be noted that the disqualifying interest is not only that of the legislator but also that of his immediate family and "any person of which he is an officer, director, trustee, partner or employee."⁹⁴ This is justified because the temptation for, and public appearance of, unethical behavior is as great where such other persons are interested as it is where the legislator himself is interested, due to his close connection with them and his opportunity for personal benefit if they are favored by governmental action. Although the legislator may have a close relative not within his immediate family whose interest might create similar dangers, the line must be drawn somewhere.

88. Legislative Code of Ethics § 5(c), PA. STAT. ANN. tit. 46, § 143.5(c) (1969).

89. *Id.*

90. See note 77 *supra*.

91. This exclusion is also justified by the need to balance the objective of promoting actual and apparent integrity in government against the need for recruitment of able public servants. See notes 5-7 and accompanying text *supra*.

92. Buss, *supra* note 5, at 355.

93. Although the Code requires that the member believe or have reason to believe that the state will be involved or directly interested in the matter in question, see note 86 *supra*, it does not provide that the legislator must have any knowledge or reason to know of his private interest. While this prerequisite might seem unnecessary because the legislator will probably know his and his family's interests, the knowledge requirement is contained in the Massachusetts and federal statutes and has been commended on the ground that it sanctions the use of blind trusts for officials' investments. Perkins, *supra* note 7, at 1134. See 18 U.S.C. § 208 (1970); Villanova University Charles Widger School of Law Digital Repository, 1973

94. Legislative Code of Ethics § 5(c), PA. STAT. ANN. tit. 46, § 143.5(c) (1969).

The only exception contained in section 5(e) which might relieve a legislator from the restrictions of section 5(c) is section 5(e)(2)⁹⁵ which exempts participation in the affairs of religious, civic, or similar organizations or in the activities of a political party. However, even assuming that "participation" as used in section 5(e)(2) means the taking of action as a government official,⁹⁶ it would seem that the situations which this section would exempt from section 5(c)'s prohibition would be few, for unless the affairs or activities participated in also constituted "transactions involving the Commonwealth" and the participating member was personally, substantially, and economically interested therein, participation would not be prohibited in the first place.

With respect to the self-dealing situation, the Code goes beyond the conflicts legislation of most other states, and those states would do well to follow Pennsylvania's lead. While the codes of ethics of several states contain provisions similar to section 4(3) of the Pennsylvania Code,⁹⁷ and some statutes restrict the legislator's right to vote on legislation in which he has a personal interest,⁹⁸ only Louisiana⁹⁹ and Massachusetts¹⁰⁰ have statutory prohibitions similar to section 5(c) of the Pennsylvania Code.¹⁰¹ However, the Massachusetts act is weakened by the apparent exclusion of general legislation as a matter with respect to which the interested legislator may not participate.¹⁰²

Texas' recently revised and expanded code of ethics now includes a strong prohibition against a legislator "hav[ing] any interest, financial or otherwise . . . in substantial conflict with the proper discharge of his

95. PA. STAT. ANN. tit. 46, § 143.5(e)(2) (1969).

96. Section 5(c) speaks in terms of "participate," and the definition contained in section 3(8) is of that term, while section 5(e)(2) covers "participation." PA. STAT. ANN. tit. 46, §§ 143.3(8), 5(c), 5(3)(2) (1969). It would seem reasonable to interpret both terms as having the same or similar meaning, but the Code does not clearly answer the question.

97. See, e.g., FLA. STAT. ANN. § 112.313(3) (1973); MASS. GEN. LAWS ANN. ch. 268A, § 23(d) (1970); N.Y. PUB. OFFICERS LAW § 74(3)(d) (McKinney Supp. 1972); WASH. REV. CODE ANN. § 42.22.040(7) (1972).

98. Texas prohibits the legislator from voting on a bill in which he has a personal interest and also requires disclosure of that interest. TEX. REV. CIV. STAT. ANN. art. 6252-9, § 4(f) (Supp. 1972). Texas also prohibits a member from introducing a bill which would directly and particularly affect a client or employer of that member. *Id.* art. 6252-9, § 4(m).

The California code prohibits participation in the passage or defeat of any legislation in which the member has a personal interest. However, the legislator easily can exempt himself from the disqualification mandate by filing a statement in the legislature journal disclosing his interest and swearing that he can vote fairly and objectively notwithstanding the interest. CAL. GOV'T CODE § 8920(a)(5)(i) (West Supp. 1973).

99. LA. REV. STAT. ANN. § 42:1143(c) (1965).

100. MASS. GEN. LAWS ANN. ch. 268A, § 6 (1970).

101. The Illinois act is interesting because it gives the legislator the option of divesting himself of his personal interest, abstaining from participation in the official activity, or neither, and lists several factors which the member should consider in making his choice. ILL. ANN. STAT. ch. 127, § 603-202 (Smith-Hurd 1967). Such a provision is no prohibition but merely a guide since it leaves the decision up to the conscience and integrity of the legislator. ILL. ANN. STAT. ch. 127, § 603-202 (Smith-Hurd Supp. 1972).

102. MASS. GEN. LAWS ANN. ch. 268A, § 1(k) (1970).

duties in the public interest."¹⁰³ While the Texas statute facially appears to be an effective proscription, it is submitted that the Pennsylvania approach of simply prohibiting public participation where personal interests are involved, rather than the personal interest itself, is superior as it has a less disruptive effect on the private interest of the legislator, while adequately protecting the public by restricting the legislator's participation in a matter in which he has a private interest. The Texas approach could feasibly force a legislator to dissolve an important personal interest that might create a conflict situation only once. Such overly stringent standards always bear the practical risk of being considered unenforceable, and thus being ignored.¹⁰⁴

Despite the general superiority of the Pennsylvania self-dealing provision, at least two modifications of section 5(c), suggested by other states' conflicts legislation, would strengthen the Code. First, it is submitted that the general assembly should amend the section to prohibit "personal and substantial" participation instead of the present overly narrow element of participation "as a principle." The suggested phraseology is used in several sections of the federal conflicts of interest statute¹⁰⁵ and its inclusion in section 5(c) would not only broaden the prohibition, but would also enable the Pennsylvania courts enforcing the section to draw upon the federal courts' construction of the same language.¹⁰⁶

A second modification of section 5(c) would be to prohibit participation not only when the member presently holds a position with an interested "person" but also when the member is negotiating or has some arrangement for prospective employment with the "person," as is done by the federal act¹⁰⁷ and the Massachusetts statute.¹⁰⁸ Although the absence of such a provision permits evasion of section 5(c)'s restriction by postponing acceptance of employment until after participation in the governmental transaction, it may have been omitted because of fears that

103. TEX. REV. CIV. STAT. ANN. art. 6252-9, § 4(d) (Supp. 1972).

104. The Texas approach of disallowing the interest is, of course, that used by many states in dealing with the public contracts problem. The approach is more appropriate in that context, since the great opportunity for maximizing private interests in allocating public monies necessitates a strict sanction, and because a form of action — the making of the contract with a public agency — is the proscribed conduct — not the private interest itself, which may remain provided business is not done with the state. See notes 137-42 and accompanying text *infra*.

105. 18 U.S.C. § 208(a) (1971). It has been stated:

The language [of the federal act] is designed to connote the degree of relationship between a government official and a particular governmental proceeding which will bring to bear the prohibitions of those sections The qualifying adverbs "personally and substantially" are intended to "rule out participation by purely ministerial or procedural acts, but not to create a loophole for the lazy executive in the chain of command who may have not bothered to dig into the substance of the case."

Perkins, *supra* note 7, at 1128, quoting BAR ASS'N REPORT, *supra* note 6, at 274 (footnote omitted).

106. While the federal act is not applicable to congressmen, this does not necessarily mean that the "personal and substantial" language would be inappropriate for legislators. University of Chicago Law School of Law Digital Repository, 1973

107. 18 U.S.C. § 208(a) (1970).

108. MASS. GEN. LAWS ANN. ch. 268A, § 6(a) (1970).

a prospective employment clause would have an unnecessary deterrent effect on legislative service due to the part-time legislator's need to arrange for private employment both during and after his term. However, it is submitted that when either a present arrangement or negotiation for future remuneration exists, the danger of self-interest coloring a legislator's judgment is great enough to justify the prohibition.

B. Personal Interest in State Contracts

The danger involved in the situation in which state contracts are made with either a state legislator or an entity in which the legislator has a financial interest, is that the agency letting the contract may be susceptible to influence. While the relationship between the legislature and the agency may give the legislator or entity a competitive advantage over other potential contractors,¹⁰⁹ of even greater importance is the fact that a state contract in which a legislator has a personal financial interest gives the *appearance* of favoritism and influence peddling. Thus, it can be stated as a broad principle that no state legislator should have any personal interest in any state contract.¹¹⁰

Although Pennsylvania has various statutory provisions which forbid state executive officials and employees from having a personal interest in state contracts,¹¹¹ there is no express prohibition in the Legislative Code of Ethics specifically directed at legislator's private interests in state con-

109. Cf. Comment, *supra* note 7, at 383-84. State agencies are dependent upon the legislature for such things as appropriations and the confirmation of appointments. The legislature also controls the scope of an agency's jurisdiction and power. *Id.* at 385-86.

110. It must be noted that the principle that a state legislator should have no interest in a state contract somewhat overlaps the prohibition against legislative self-dealing. However, the self-dealing restriction is violated only by participation in a governmental matter in which the legislator has a private interest, while public participation is generally not required under the contract prohibition — the legislator's interest alone violates the statute. Buss, *supra* note 5, at 366. Yet, those statutes which prohibit personal interest in a governmental contract may be aimed at public participation as well as private interests. See, e.g., CAL. GOV'T CODE § 1090 (West Supp. 1973); MASS. GEN. LAWS ANN. ch. 268A, § 7 (1970). Clearly, those statutes proscribing contracts upon which the interested legislator votes are directed at legislative participation in governmental activity affecting the legislator's private interests. See, e.g., KY. REV. STAT. § 61.096(2) (1971).

A further difference between the self-dealing and contract prohibitions is that a self-dealing prohibition can be avoided by mere abstention from participation, while the provision against interest in a contract forces the solon to choose between his government employment generally and his private interest. Finally, the contract restriction is limited to state contracts while the self-dealing prohibition applies to all matters in which the state may be involved or interested. Buss, *supra* note 5, at 366.

111. See, e.g., State Adverse Interest Act, PA. STAT. ANN. tit. 71, §§ 776.1 *et seq.* (1962). This statute prohibits a state advisor, consultant, or appointment employee from having any "adverse interest" in a contract upon which he advised or consulted or which was made by his employer/agency. Further, the act provides that no one with an adverse interest in a state contract is eligible for employment with the contracting agency, and state employees are forbidden both from influencing the making of a state contract in which they are interested and from representing any

tracts.¹¹² The prohibitions contained in sections 5(b), (c), and (d) would apply to certain situations in which the member is interested in a state contract, but they scarcely cover the whole problem.

As discussed above, the gist of the offense defined in section 5(c) is participation by the legislator as a principal in a matter in which he is interested, and, accordingly, it would prohibit a member's interest in a state contract only if he, as a state official, had personal controlling authority with respect to the award of the contract.¹¹³ However, section 5(c) can easily be avoided by abstention,¹¹⁴ but abstention does not necessarily prevent a legislator's private interests from influencing the allocation of public funds. The danger of reciprocal dealing exists since his colleagues might favor his personal interest, with the expectation that they might later enjoy similar sympathetic treatment.

Thus, in this particular problem area, a proscription against the interest, rather than the participation, would seem necessary if conflicts are to be avoided and the appearance of propriety is to be maintained in the awarding of public contracts. Hence, it is submitted that section 5(c), while an effective deterrent to self-dealing by an interested legislator,¹¹⁵ is inadequate to cope with the more subtle problem of reciprocal dealing.

The applicability of section 5(b) and (d) to the contract situation is even more limited than that of section 5(c). Under section 5(b) and (d) the only interest in the contract which would be prohibited would be the receipt of compensation or some "thing of economic value" for aiding the private contractor in procurement of the contract.¹¹⁶ Under section 5(b) the aid furnished would have to consist of consultation which concerns general assembly matters or which draws upon confidential information.¹¹⁷ Section 5(d) applies to the contract situation only to the extent that the member "assists" the private contractor and even then does not absolutely ban such assistance. The section merely conditions assistance upon the disclosure of certain information filed with the chief clerk of the house or with the secretary of the senate.¹¹⁸ All of the activities covered by these prohibitions should be foreclosed to the legislator with respect to state contracts, but none of the provisions is directed specifically at the situation in which a member has a private interest in a state contract, and none of them, either separately or collectively, is sufficiently extensive to adequately cover the entire contract problem.

112. Legislative Code of Ethics §§ 1-8, PA. STAT. ANN. tit. 46, §§ 143.1-143.8 (1969). The complete text of the Legislative Code of Ethics is set forth in an appendix to this Comment.

113. PA. STAT. ANN. tit. 46, § 143.5(c) (1969). See notes 80-96 and accompanying text *supra*.

114. Cf. text accompanying notes 83-84 *supra*.

115. See notes 77-110 and accompanying text *supra*.

116. PA. STAT. ANN. tit. 46, §§ 143.5(b), (d) (1969).

117. *Id.* § 143.5(b).

There is a provision in the Pennsylvania constitution which commands that the general assembly maintain a competitive bidding system by law for all state purchasers, and which provides that such a law is to prohibit state officials and employees from being interested in such purchases.¹¹⁹ It would appear that this provision is not self-executing, but requires implementing legislation. However, there are no statutes in Pennsylvania which extend this prohibition to state legislators. The Legislative Code of Ethics is the logical place for the legislature to satisfy this constitutional requirement, and a prohibition against public officials and employees having personal interest in state contracts should be added.¹²⁰

Although the Code contains no direct prohibition of a member's interest in state contracts, it might do so by implication. Section 5(e) provides several exceptions which, despite the fact that they affect other prohibitions of the Code, apply most specifically and directly to the contract situation. Thus, section 5(e)(4) permits the legislator to share in compensation received by a "person" in which the member has a proprietary interest when the compensation was received pursuant to a state contract awarded through competitive bidding, or by direct engagement in emergency situations in which the law permits dispensation of bidding.¹²¹ According to commentators, the theory behind such an exception is that the bidding procedure leaves little or no discretion to the contracting agency, and thereby eliminates the possibility of improper influence and favoritism.¹²² In addition, it has been argued that disqualification of a business enterprise which submits the best bid merely because a legislator has an interest in the entity unduly restricts the state by forcing it to accept work done at greater expense.¹²³

The language of section 5(e)(4) indicates that it exempts only contracts between the state and some "person" in which the member has an interest, but does not exempt contracts between the state and the legislator himself, assuming such a prohibition is to be implied. Such a reading of the section is at least inferentially supported by the proviso that the exception granted does not apply where the member has assisted in the procurement of the "person's" bid or engagement without bidding.¹²⁴ This

119. PA. CONST. art. 3, § 22, provides in pertinent part:

The [competitive bidding] law shall provide that no officer or employe of the Commonwealth shall be in any way interested in any purchase made by the Commonwealth under contract or otherwise.

Id.

120. Apparently PA. CONST. art. 3, § 22 has been totally ignored, at least by the Pennsylvania legislature. The prohibition mandated by or contained in that provision is worded so as to permit no exceptions. However, in section 5(e) of the Code, the general assembly has included two exceptions which appear directed primarily at the contract situation. PA. STAT. ANN. tit. 46, §§ 143.5(e)(4), (6) (1969). These exceptions would not be valid under a literal reading of the Pennsylvania constitution.

121. PA. STAT. ANN. tit. 46, § 143.5(e)(4) (1969).

122. Note, *supra* note 9, at 1225. *But see* note 149 *infra*.

123. Note, *supra* note 5, at 459.

124. Legislative Code of Ethics § 5(e)(4), PA. STAT. ANN. tit. 46, § 143.5(e)(4) (1969). This proviso is actually directed at self-dealing by the member in the

proviso is justified because the member is doubly serving the state when he acts as a government procurer as well as a legislator.¹²⁵ It is submitted that the intended impact of section 5(e)(4) was that competitive bidding or emergency situations should excuse a private interest only where the legislator's interest is indirect in both the private and public aspects. Accordingly, section 5(e)(4) should be read as affecting only those situations where the member's private interest is indirect through another person and the member's public role is limited to his *general* legislative duties.

However, the practical effect of section 5(e)(4)'s distinction may be negligible, even if a contract prohibition were implied, because a legislator desiring to contract with the state could simply set up a dummy corporation through which he could submit bids. In the event a bid were accepted, he would be within the exception of section 5(e)(4). In order to prevent such evasive tactics, an effective ethics committee is necessary to closely scrutinize such transactions and to refuse to grant exemptions where the contract is with another "person" in form only.¹²⁶

Section 5(e)(6) also contains several exceptions which are most specifically and directly applicable to the contract situation. Section 5(e)(6)(i) excepts contracts in which the "total interest of the member and his immediate family in the persons receiving said compensation is less than ten per cent."¹²⁷ Although the provision does not so state, the 10 per cent interest apparently means ownership or control of 10 per cent of the total outstanding proprietary interests or stock in the "person."¹²⁸

situation where the legislator not only has an interest in the contract but actively aids in the procurement thereof as a government official. Where the legislator is the contracting party, he is actively participating in the contracting process, and this situation would seem to come within the purpose of the proviso if not its express language.

125. See Buss, *supra* note 5, at 368.

126. See notes 300-19 and accompanying text *infra*.

127. PA. STAT. ANN. tit. 46, § 143.5(e)(6)(i) (1969).

128. There is still a problem with respect to the situation where the member is personally interested in the contract even though he has little or no proprietary interest in the contracting entity. An example of such a case would be the situation in which the legislator is also a member or employee of a firm which holds a state contract; if the legislator's salary depends upon the contract, he is interested in the contract even though he owns no part of the firm.

It would appear that there is no non-proprietary interest problem in those states whose statutes provide in effect that no "person" of which the member and/or his family owns or controls 10 per cent or more shall contract with the state except pursuant to competitive bidding. The language of such acts apparently limits the disqualifying interest to those which are proprietary. See, e.g., ARIZ. REV. STAT. ANN. § 41-1292 (Supp. 1971); N.Y. PUB. OFFICERS LAW § 73(4) (McKinney Supp. 1972). However, since many statutory provisions governing contracts merely forbid the member from being interested, and exempt certain de minimis proprietary interests, the question is presented whether non-proprietary interests are excluded as well, or whether the reference to proprietary interests in the exception can be taken as indicating that the unmodified term "interest" in the prohibition means only proprietary interest. See, e.g., MASS. GEN. LAWS ANN. ch. 268A, § 7 (1970).

It has been argued that the existence of the de minimis interest exception should not be read as excluding non-proprietary interests from the contract prohibition. Buss, *supra* note 5, at 376. Where the interested non-owner member is in a position to directly benefit from his firm's state contract, as in the example given by Villanova University and Villanova School of Law Digital Repository, 1973, as great as where

The apparent reason for such an exception is that it is presumed that where the member's interest in the contract is remote or *de minimis* there is no motive for corruption and there is, as a practical matter, no real conflict. However, this rationale is not totally applicable to section 5(e)(6)(i). By stating the exception only in terms of percentage ownership, the provision might exempt interests of a member in a contracting "person" which are significant enough not to be really *de minimis*, while leaving interests truly *de minimis* in amount within the prohibition, assuming, again, that one is to be implied.¹²⁹ Therefore, it is submitted that a more justifiable exception would result if section 5(e)(6)(i) required personal economic interests to meet both a 10 per cent test and a specified dollar amount test before qualifying as *de minimis*.¹³⁰

The Pennsylvania *de minimis* interest exception does not permit the member himself to contract with the state. Only a contract with a "person" of which he and his family own less than a 10 per cent interest falls within the exemption. The practical significance of this distinction might be limited by the ability of a legislator to create a dummy corporation through which he could contract with the state. However, an evasion

the legislator's interest is whole or partial ownership of the firm, and, if so, the contract should be prohibited. However, there is an argument that the *de minimis* interest exception indicates that the legislature believed that insubstantial interests are not sufficient to trigger the contract prohibition and that non-proprietary interests are generally insignificant. Since it cannot be said in the abstract that all non-proprietary interests are insubstantial, it is submitted that this problem can be best resolved on an *ad hoc* basis by determining whether the reasons behind the prohibition or those underlying the *de minimis* exception apply in a particular case. The Pennsylvania general assembly should enact a contract prohibition which leaves open the opportunity for case by case determinations instead of expressly or inferentially excluding all non-proprietary interests.

129. For example, if legislator *A* owns 9 per cent of the stock of a publicly held corporation, *X* which has 1,000,000 shares outstanding at a market value of \$10.00 per share, *A*'s monetary interest in *X* is \$900,000.00 and his interest may be controlling. Yet, since the exception is stated in terms of 10 per cent ownership or control, *A*'s quite substantial interest in the corporation would not bar a state contract with *X*. On the other hand, if legislator *B* owns 40 per cent of the 1,000 shares of a closely held corporation, *Y*, which have a market value of \$2.00 per share, due, perhaps, to restrictions on alienation and the management-control structure of *Y* (of which *B* is not a part), his interest, although noncontrolling and worth only \$800 on the market, would bar a state contract with *Y*.

An alternative standard of a specific dollar amount may similarly lead to incongruous results. To illustrate, assume a *de minimis* exception fixing \$5,000 as the maximum qualifying amount. If legislator *B* owns 60 per cent of the outstanding shares of *Y*, his monetary interest would be \$1,200.00 and his controlling interest would not bar a state contract with *Y* even though he stands to gain considerably from one. However, if legislator *C* owns 5 per cent of the 2,000 outstanding shares of a close corporation, *Q*, which have a market value of \$60.00 per share, a state contract with *Q* would be barred even though *C*'s 5 per cent interest may, as a practical matter, be worth much less than *B*'s interest in *Y*.

130. California has taken a different approach in conditioning its *de minimis* exception to instances where the member's proprietary interest is less than 3 per cent in a corporation, and the dividends and other payments derived from that corporation do not exceed 5 per cent of his total annual income. CAL. GOV'T CODE § 1091.5 (West Supp. 1973). While it seems correct that the importance of the interest to the individual legislator and thus the temptation for wrongdoing will vary according to the percentage of his total income involved, it would appear that sole reliance on a percentage formula may allow significant dollar amounts to escape the prohibition where the member's total personal interests are on a large scale.

of section 5(e)(6)(i) by this route would be more difficult in practice than would a similar attempt to evade the bidding exception of section 5(e)(4) because the member could not be the sole owner of the dummy "person" and still come within section 5(e)(6)(i); he would have to organize the company with others so that he and his immediate family own less than 10 per cent.

The de minimis exception in Pennsylvania, however, as in most other states,¹³¹ is excessively broad in that each corporate proprietary interest is considered separately in determining whether that interest is de minimis. Thus, a member might have interests in several corporations doing government business, and derive most of his income therefrom, yet fall within the exception of section 5(e)(6)(i) if his interests do not exceed 10 per cent in any one corporation. One apparent modification which would curb such possible excesses as suggested above would be the addition of a proviso to section 5(e)(6)(i) which would stipulate that the aggregate income of a member derived through "persons" receiving compensation from the state could not exceed a set percentage of his total income, or, more effectively, a fixed dollar amount. Of course, such a clause could only be effective if disclosure of a member's financial interests were required and an effective ethics committee existed to review the required disclosure statements.¹³²

In addition to the de minimis interest exception, section 5(e)(6) contains two other exemptions aimed directly and specifically at the contract situation. Section 5(e)(6)(iii) exempts the receipt of compensation as a result of the state's purchase of "newspaper advertising required by law."¹³³ Section 5(e)(6)(ii) excludes from the contract prohibition, assuming one is implied, the receipt of compensation by the member, or a "person" in which he is interested, when the recipient is the exclusive supplier of property or services purchased by the state.¹³⁴ This exception is justified since the state might otherwise, on occasion, be totally deprived of needed land, goods, or services were it not able to deal with a legislator.¹³⁵ However, a claim of "exclusive supplier" status should be closely scrutinized in order to assure that the contracting agency has not slanted the contract specification to artificially make the member, or "person" in which he holds an interest, the sole supplier.

In the exclusive supply situation, there is an acute danger that the privately interested member may receive an unconscionable profit at the state's expense. While the need for a particular product or property may justify this exception on occasion, it is anomalous to disallow conflicts generally, but not when the government official is successful to the extent of maintaining a monopoly position. Accordingly, it is submitted that a

131. See note 141 and accompanying text *infra*.

132. See notes 273-319 and accompanying text *infra*.

133. PA. STAT. ANN. tit. 46, § 143.5(e)(6)(iii) (1969).

134. *Id.* § 143.5(e)(6)(ii).

135. Cf. Note, *supra* note 9, at 1227.

disclosure requirement should be introduced into section 5(e)(6)(ii) which would necessitate a public statement of both the legislator's interest and the particulars of the contract if the exception is to take effect.¹³⁶

Unlike Pennsylvania, other states which employ a statutory approach to the regulation of governmental conflicts of interest have placed express restrictions upon the freedom of the legislator, or business entities in which he holds an interest, to contract with the state. Apparently, however, no state has absolutely prohibited all such contracts. Some merely require that legislators engaged in business activity with the state to file a statement with a designated official disclosing their interests in governmental transactions.¹³⁷ Other states, concerned with the more flagrant violation of the contract principle, prohibit their legislators from having an interest in a contract made by either branch of the legislature;¹³⁸ some merely proscribe contracts upon which the interested legislator may vote.¹³⁹ Most of the remaining states prohibit contracts between a legislator, or entity in which he has an interest, and a state department or agency. However, certain exemptions are generally made to this prohibition, the most common being a competitive bidding exception similar to Pennsylvania Code section 5(e)(4)¹⁴⁰ and a de minimis interest exception similar to section 5(e)(6)(i).¹⁴¹ Only the New York Statute contains an exception comparable to section 5(e)(6)(iii),¹⁴² and apparently no other state exempts the exclusive supplier situation as does section 5(e)(6)(ii).

It is submitted that Pennsylvania should follow the lead of those states which directly prohibit legislators from contracting with the state. Notwithstanding the lack of an express prohibition however, the Pennsylvania competitive bidding and de minimis exceptions are generally commendable. The Pennsylvania competitive bidding exception is not as

136. For a discussion of the present disclosure requirements under the Legislative Code of Ethics, see notes 279-82 and accompanying text *infra*.

137. See, e.g., FLA. STAT. ANN. § 112.313(2) (1973). Where the personal interest is "remote," the California statute requires disclosure of the legislator's interest to the house of which he is a member and ratification of the contract by that body before it is valid. CAL. GOV'T CODE § 1091(a) (West Supp. 1973).

138. See, e.g., MASS. GEN. LAWS ANN. ch. 268A, § 7 (1970).

139. See, e.g., KY. REV. STAT. ANN. § 61.096(2) (1971).

140. See, e.g., ARIZ. REV. STAT. ANN. § 41-1292 (Supp. 1971); KAN. STAT. ANN. § 75-4304(a) (Supp. 1972); KY. REV. STAT. ANN. § 61.096(6) (1971); MASS. GEN. LAWS ANN. ch. 268A, § 7 (1970); MICH. COMP. LAWS § 15.304(d) (Supp. 1973); OHIO REV. CODE ANN. § 2919.09 (Page 1954).

141. See, e.g., ARIZ. REV. STAT. ANN. § 41-1292 (Supp. 1971) (interest 10 per cent or less; contract less than \$1000); KY. REV. STAT. ANN. § 61.096(6) (1971) (ownership 10 per cent or less; \$25 contract); MICH. COMP. LAWS § 15.304 (Supp. 1973) (1 per cent ownership of stock not listed on stock exchange or, where stock is listed, ownership of stock with present market value of less than \$25,000); N.Y. PUB. OFFICERS LAW § 73(4) (McKinney Supp. 1972) (10 per cent or less interest; \$25 contract); OHIO REV. CODE ANN. §§ 2919.09, .11 (Page 1954) (contract value of \$50 or less; 5 per cent or \$500 ownership whichever is the lesser).

142. N.Y. PUB. OFFICERS LAW § 73(4) (McKinney Supp. 1972) (provision of legal notices or advertisements in newspapers designated by law for that purpose and for which rates are fixed by law). Cf. KAN. STAT. ANN. § 75-4304 (Supp. 1972) (exception for contracts for which price or rates fixed by law).

broad as those of most states with comparable provisions in that section 5(e)(4) does not exempt a member from personally contracting with the state.¹⁴³ Although, as mentioned above, this distinction may make no practical difference, the Pennsylvania approach is more appropriate because it affords a court the opportunity to prevent a legislator from doubly serving the state. Moreover, even with its limitations, section 5(e)(6)(i)'s *de minimis* interest exception is more stringent than corresponding exceptions in a majority of other states' statutes. The Pennsylvania provision exempts the receipt of compensation only where the member *and* his immediate family own less than 10 per cent of the contracting party while most other states' exceptions permit contracting where the member *or* his family own less than the stated percentage.¹⁴⁴ The latter type provision affords a legislator the opportunity to evade the contract prohibition by transferring enough of his investments to his spouse so that neither one of them owns more than the maximum percentage allowed,¹⁴⁵ a loophole not present in Pennsylvania because of the language of section 5(e)(6)(i).¹⁴⁶

Under section 5(e) of the Code, and the conflicts legislation of every other state except Massachusetts,¹⁴⁷ the legislator need only establish that he is within one of the applicable exceptions and he is exempt from the contract prohibition. That is, the member is exempt if the contract is let by bidding *or* his interest in the contracting "person" is *de minimis or* the service purchased is newspaper advertising *or*, in Pennsylvania, he *or* the "person" in which he has an interest is the exclusive supplier. However, stringent controls of the contract situation are needed because of the abundance of opportunities for dishonest legislators to exploit their influence with those responsible for letting government contracts. Since public confidence in the integrity of government is weakened whenever a legislator is interested in a state contract,¹⁴⁸ and because the

143. See note 140 *supra* for a compilation of state statutes which permit legislators to personally contract with the state in a competitive bidding situation.

144. See, e.g., ARIZ. REV. STAT. ANN. § 41-1292 (Supp. 1971).

145. Since the interest of the legislator's immediate family is *his* interest in a practical sense, such a statute would permit state contracts with a "person" of which the member in effect controlled almost 20 per cent (the member himself 9.5 per cent and his immediate family 9.5 per cent). *Id.*

146. PA. STAT. ANN. tit. 46, § 143.5(e)(6)(i) (1969). Of course, this provision does not completely close the loophole because the member can still manipulate his and his immediate family's interest in conjunction with those of relatives not within his immediate family and evade the prohibition. This could be prevented by extending the prohibition to cover interests of relatives further removed than the member's immediate family, see, e.g., ARIZ. REV. STAT. ANN. § 41-1292 (Supp. 1971), or prohibiting any contract between the state and a "person" who makes or holds the state contract for the legislator's benefit or on his account, regardless of the extent of the member's interest in the "person." See, e.g., KY. REV. STAT. ANN. § 61.096(6) (1971). See Comment, *supra* note 7, at 385. This latter prohibition could prove too nebulous for a criminal statute and might be handled more appropriately by a general code of ethics.

147. See notes 140-41 *supra*.

148. It should be remembered that one of the express purposes of the Legislative Code of Ethics is to "protect the public confidence in its Legislature." Legislative Code of Ethics § 2(4), PA. STAT. ANN. tit. 46, § 143.2(4) (1969).

theories behind the bidding and de minimis interest exceptions are not convincing as a practical matter,¹⁴⁹ it is submitted that the Massachusetts approach of combining these two exceptions should be adopted by the Pennsylvania general assembly. Under this approach, the member, or "person" in which he is interested, may contract with the state only if the contract is let by competitive bidding *and* the legislator's interest in the "person" is less than 10 per cent.¹⁵⁰ The exceptions provided in sections 5(e)(6)(ii) and (iii) of the Pennsylvania Code can be left as alternatives, although a disclosure requirement would be beneficial in each case so that the contracting agency and the public are at least aware of the member's interest.¹⁵¹ Regardless of what the general assembly does with respect to the exceptions, it should and must enact a specific prohibition directing that no member of the state legislature is to be interested in a state contract.

C. *Assisting Outsiders in Dealings with the Government*

A third basic conflict of interest principle is that "public officials should not in general be permitted to step out of their official roles to assist private entities or persons in their dealings with government."¹⁵² The most obvious situation that falls within this principle is that in which a public official or employee actually represents a private party before a state agency. However, the principle is not limited to representation and would forbid any assistance to the private party by the official or employee. As with the contract principle, focus is centered upon the private activity of the official — he need not have any connection with the governmental agency or department involved nor any contact in his public capacity with the matter with respect to which the assistance is afforded.¹⁵³ The principle is based upon the premise that a public official will have influence or involvement with agencies or departments other than his own, and reflects a policy which demands undivided loyalty to the government without regard to whether any actual exploitation of public office is possible.¹⁵⁴ With respect to state legislators in particular, there is an even greater danger that the agency will be susceptible to influence and that the member will have an unfair advantage because

149. See text accompanying notes 124-25 *supra*. Since the contracting agency is generally authorized to award the contract to the lowest *responsible* bidder, the agency retains a good deal of discretion (it may accept a higher bid on the grounds that the bidder is more responsible). Note, *Conflict of Interests: State Government Employees*, 47 VA. L. REV. 1034, 1055 (1961), and regardless of how it is awarded or the extent of the member's interest in the contracting "person," a state contract in which a member of the legislature is interested creates the appearance of impropriety. See Comment, *supra* note 7, at 383.

150. MASS. GEN. LAWS ANN. ch. 268A, § 7 (1970). There is also an absolute exemption if the member's interest is less than 1 per cent. *Id.*

151. See Note, *supra* note 64, at 681-82; Note, *supra* note 8, at 457. See also, notes 273-99 and accompanying text *infra*.

152. Perkins, *supra* note 7, at 1120 (emphasis omitted).

153. Buss, *supra* note 5, at 323; Perkins, *supra* note 7, at 1120.

154. Buss, *supra* note 5, at 323.

of the numerous controls that the legislative branch exercises over state agencies.¹⁵⁵ Moreover, as with all conflict of interest situations, a legislator's assistance to an outsider in dealing with the government creates the public appearance of unethical conduct.

However, this principle apparently cannot be applied without reservation to state legislators¹⁵⁶ because, traditionally, it has been deemed permissible for a member to aid his constituents in dealings with the state bureaucracy, and such action is usually considered improper only when done for profit.¹⁵⁷ Accordingly, the Legislative Code of Ethics does not absolutely prohibit assistance to outsiders by legislators. Section 5(d) of the Code merely prohibits the receipt, or entry into an agreement to receive compensation¹⁵⁸ "for assisting any person in any transaction involving the Commonwealth or any of its officials or agencies" unless the member files a written statement disclosing certain specified information.¹⁵⁹ Thus, the Code actually does not prohibit the compensated assistance itself, but merely requires disclosure — assistance without disclosure is forbidden.¹⁶⁰

Notwithstanding the lack of an absolute prohibition, section 5(d) is quite broad in scope. The section is applicable not only when the member actually receives compensation for services rendered in assisting the outsider, but also when he agrees to receive compensation for services rendered or to be rendered. The latter provision prevents the evasion of

155. Comment, *supra* note 7, at 385-86; Note, *supra* note 5 at 459; Note, *supra* note 64, at 684. See also note 111 *supra*. The rationale of both the contract and the outside assistance prohibitions are essentially the same.

156. Perkins asserts that this principle is very stringent when applied to any governmental employee or official, on the state or federal level. Perkins, *supra* note 7, at 1120-21.

157. Some states specifically provide that their conflict of interests statute cannot be construed to restrict a member's acting for a constituent without compensation before a state agency. Such a section would be an appropriate addition to the Legislative Code of Ethics. See, e.g., TEX. REV. CIV. STAT. ANN. art. 6252-9.4(n) (Supp. 1972). See also, Comment, *supra* note 7, at 385-88.

158. See note 45 *supra*.

159. PA. STAT. ANN. tit. 46, § 143.5(d) (1969). The complete text of the Legislative Code of Ethics is set forth in an appendix to this Comment.

Although disclosure is the essence of section 5(d), the scope and method of the disclosure required will not be discussed at this point but rather will be handled in a separate disclosure section. See notes 273-99 and accompanying text *infra*.

160. It must be noted that sections 5(a) and (b) also prohibit some form of legislator assistance to outsiders. Section 5(a) forbids the legislator from engaging in compensated lobbying or voting in the general assembly, in which situation he is assisting the person who wants the legislation in question either passed or defeated. PA. STAT. ANN. tit. 46, § 143.5(a) (1969). For a full discussion of section 5(a) see notes 190-201 and accompanying text *infra*. Section 5(b) prohibits the member from compensated consultation which is devoted to matters before, or the operations of, the general assembly or which draws upon confidential information. PA. STAT. ANN. tit. 46, § 143.5(b) (1969). For a more thorough analysis of section 5(b), see notes 224-31 and accompanying text *infra*. However, there is no aspect of dealing with the government involved in either the 5(a) or 5(b) situation.

The provision of section 4 that no member shall "[u]se or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others" would apply in situations involving assistance to outsiders. Legislative Code of Ethics, § 4(3). PA. STAT. ANN. tit. 46, § 143.4(3) (1969). See Note, *supra* note 104 at 688.

the disclosure requirement by postponing payment until after the legislator's term. To fully preclude such evasion, the phrase "any agreement with any person for compensation" should be broadly construed to include not only formal agreements but also informal understandings or arrangements.¹⁶¹

The activity of the member covered by section 5(d) is assistance to an outsider; the Code broadly defines "assist" to mean to "act, or agree to act, in such a way as to help, aid, advise, furnish information to, or otherwise provide assistance to another person."¹⁶² However, due to the definition of "assist" in section 3(3), section 5(d) contains a mens rea requirement, for the member must not only believe his activity will aid the outsider but must also act with the intent to assist such "person" in order to be subject to the disclosure requirement.¹⁶³

Finally, the section is broad with respect to the type of assistance which will trigger the disclosure requirement since it extends to assistance "in any transaction involving the Commonwealth or any of its officials or agencies."¹⁶⁴ As discussed above, "transaction involving the Commonwealth" is defined by the Code to include any matter in which the state has more than a remote interest.¹⁶⁵ Since section 5(d) also applies to assistance in a transaction involving any state official or agency, the member is apparently required to disclose his assistance even if the state's interest is remote, provided one of its officials or agencies has a direct interest.

It should be noted that section 5(d) does not require that the interest of the outsider assisted be adverse to that of the state. Although there is no public-private interest conflict when the outsider's interest in a matter is consistent with that of the state, and although the member may be serving the state while assisting the outsider, it will often be very difficult to determine whether, in a given case, the interests are in fact consistent. Furthermore, even if the private and state interests are the same, the member's assistance of the outsider may enable him to use his official position for personal gain, action clearly against the public interest.¹⁶⁶

161. Such an interpretation would be consistent with the purposes of the act because there is as much a tendency for exploitation of official position and impairment of public confidence with informal arrangements as with formal agreements. See Legislative Code of Ethics § 2(d), PA. STAT. ANN. tit. 46, § 143.2(3) (1969). It is clear that the agreement for compensation can be implied and still come within section 5(d), because the last paragraph of the section requires filing of the member's disclosure statement "within ten days from the date such agreement, express or implied, was entered into." Legislative Code of Ethics § 5(d)(4), PA. STAT. ANN. tit. 46, § 143.5(d)(4) (1969). It is not clear whether this means only such agreements as would be considered implied agreements under the law of contracts, but it is submitted that it should not be so restricted.

162. Legislative Code of Ethics § 3(3), PA. STAT. ANN. tit. 46, § 143.3(3) (1969).

163. *Id.*

164. Legislative Code of Ethics § 5(d), PA. STAT. ANN. tit. 46, § 143.5(d) (1969).

165. Legislative Code of Ethics § 3(12), PA. STAT. ANN. tit. 46, § 143.3(12) (1969). See notes 88-89 and accompanying text *supra*.

166. Buss, *supra* note 5, at 332-33. Buss, however, argues that where the member helps a disinterested outsider, there is no conflict with the state, the prohibition (or

Many state legislators are lawyers who, because of the part-time nature of their public employment and the low salary, must maintain their private legal practices in order to support themselves and their families. A statute which absolutely prohibits legislators from assisting outsiders in dealings with the state, or in matters in which the state is interested, might eliminate many attorneys from legislative service because it would prevent them from handling criminal, tax, and other matters.¹⁶⁷ Accordingly, most states prohibiting legislators from privately dealing in matters concerning the state make an exception for lawyer-legislators, at least in the case where the proceeding is before a court, or is reviewable by a court.¹⁶⁸ However, since the Pennsylvania Code requires only disclosure, exception of lawyer-legislators from this requirement appears difficult to justify. Nevertheless, section 5(e)(7) provides that a lawyer-legislator is not subject to section 5(d)'s disclosure requirement when he receives compensation for representing an interest adverse to the state in certain specified proceedings.¹⁶⁹

Section 5(e)(7)'s requirement that the interest represented must be adverse to the state is notable since it signifies that a legislator's assistance to an outsider whose interest is consistent with that of the state would remain within the prohibition of section 5(d),¹⁷⁰ regardless of the type of proceeding involved, even though the situation would create less of a conflict of interest than one in which the outsider's interest is adverse to that of the state. Furthermore, it should be noted that section 5(e)(7) is not a blank authorization allowing lawyer-legislators to practice before the state, but rather exempts only certain specified activities. The first kind of proceeding in which a member's compensated representation is exempt from the disclosure requirement is a judicial proceeding; the second is a proceeding not initially before a court but with respect to which the state has the right to judicial review.¹⁷¹ Protection of the public is assured in these situations since the courts, being independent of the legislature, are not nearly as susceptible to legislative influence as are state agencies.¹⁷² The third and final type of proceeding specified in

in Pennsylvania, the disclosure requirement) should not apply. Nevertheless, it is submitted that the problem can best be handled on an ad hoc basis instead of conclusively construing the statute one way or the other.

167. Buss, *supra* note 5, at 333; Comment, *supra* note 7, at 388. But see Note, *supra* note 9, at 1228, wherein it is asserted that leaving the lawyer-legislator free to pursue his tax, criminal and licensing practice dilutes the purpose for the general rule against outsider assistance "because of the adverse positions of the legislator and the state government and because of the opportunity for or appearance of influence or partiality in the course of prosecution or settlement."

168. See note 185 and accompanying text *infra*.

169. PA. STAT. ANN. tit. 46, § 143.5(e)(7) (1969). This exception would have no application to the other provisions of section 5 because none of them involve the representation of any outside interests against the state.

170. See note 166 and accompanying text *supra*.

171. Legislative Code of Ethics § 5(e)(7), PA. STAT. ANN. tit. 46, § 143.5(e)(7) (1969).

172. The second exception designated by section 5(e)(7) covers "proceeding[s] . . . where the Commonwealth has a right to judicial review in a proceeding not initially before the court." Id. Since some right to judicial review exists as

section 5(e)(7) is one which "involves only . . . uncontested and routine action . . . in issuing or renewing a license, charter, certificate or similar document."¹⁷³ The public interest is safeguarded in such a proceeding because it is one in which the employee's or official's discretion, and thus the possibility of favoritism, is limited. However, such a proceeding should be closely scrutinized to assure that the action is not uncontested and routine due to the member's influence.

It is submitted that these three exceptions should be narrowly construed since they enumerate deviations from general policy and include situations in which the public interest is especially protected by the judicial, quasi-judicial, or routine nature of the proceeding. It seems apparent that section 5(e)(7) cannot be read as exempting all lawyer-like conduct by a legislator. The lawyer's role includes negotiation, compromise, and entreaty, all of which are too similar to the legislator's public duties to allow an undisclosed mingling — and conflict — of roles.¹⁷⁴ Since the danger of a legislator's public duties being subterfuged by private interests when he is allowed to represent clients before agencies which he supervises as a member of the overseeing legislative committee appears great enough to justify the proscription of such acts, the section 5(e)(7) exemption of lawyers from even disclosing the nature of their representation seems especially unwarranted.

As Pennsylvania, no state which has taken a statutory approach to conflict problems, with the exceptions of Illinois¹⁷⁵ and Massachusetts,¹⁷⁶

to most administrative decisions made by an agency, this clause might be read to exempt all contacts made by a lawyer-legislator in regard to any pending administrative decision. While the term "proceeding" in itself probably indicates an intent to include only formal, quasi-judicial hearings, it is submitted that the section be amended to cover only proceedings in which a public record is maintained. Besides narrowing the scope of the exception, such a provision would also allow a more effective judicial review and insure the exposure of the legislator's actions to the test of public opinion.

173. *Id.*

174. A recent controversy has highlighted the problem of legislators mingling their public duties and private practices. A former chief counsel for the Pennsylvania State Liquor Control Board recently testified before the Pennsylvania House Liquor Control Committee that he had several meetings with a member of that committee in which he "could never clearly distinguish whether [the legislator] was representing a client or a constituent." *Philadelphia Inquirer*, Aug. 2, 1973, § 1, at 2, col. 1 (final city ed.). It should be noted that while an ethics code is ostensibly a prohibition against certain conduct, it also acts to implicitly condone behavior not specifically proscribed. Thus, the state representative asserted that his undisclosed actions in assisting private parties before the Liquor Control Board as a lawyer on a fee basis were not inconsistent with his official status as a legislator on the overseeing liquor control committee, since, in his opinion, such action is specifically permitted under section 5(e)(7). *Philadelphia Evening Bulletin*, Aug. 2, 1973, § 1, at 1, col. 1 (two star suburban west ed.). A bill has been proposed by Governor Shapp which would bar lawyer-legislators from practicing before state agencies. H.B. No. 1347, General Assembly of Pennsylvania (1973 Sess.). See *Philadelphia Evening Bulletin*, Sept. 17, 1973, § 1, at 1, col. 8 (two star suburban west ed.).

175. ILL. ANN. STAT. ch. 127, §§ 603-105 to -106 (Smith-Hurd 1967) ; *id.* § 602-104 (Smith-Hurd Supp. 1973).

176. MASS. GEN. LAWS ANN. ch. 268A, § 4(c) (1970). The Massachusetts statute not only prohibits a legislator from receiving compensation in relation to "any particular matter" in which the state or a state agency has a "direct and substantial interest," but also forbids the member from acting as an agent or attorney with respect to such a matter regardless of compensation. *Id.*

has restricted legislative assistance to private parties unless the member receives some form of compensation for such assistance.¹⁷⁷ The statutes generally limit the legislator's freedom to appear as the representative of an outsider only before state agency proceedings or with respect to matters before such agencies.¹⁷⁸ Furthermore, those states which prohibit such compensated activity further limit their prohibitions based on the nature of the state's interest in the matter¹⁷⁹ or the character of the compensation received by the legislator,¹⁸⁰ or forbid participation only with respect to certain agencies.¹⁸¹ The remaining states do not prohibit the legislator's assistance, but only require that he publicly disclose all compensated appearances before state agencies.¹⁸²

Texas combines the two approaches by requiring registration statements from all legislators appearing before state agencies¹⁸³ and by prohibiting compensated representation by a legislator before a state agency when legislation affecting that agency is pending before the legislature or any committee of which the legislator is a member and when the contact is not adversative or of public record.¹⁸⁴

Every state with definitive conflicts legislation has recognized the problem that these restrictions pose for the lawyer-legislator. Accordingly, each state exempts from its statutory provisions legal assistance to outsiders, at least with respect to matters concerning court cases and appearances

177. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1291(4) (Supp. 1971); CAL. GOV'T CODE § 8920(b)(3) (West Supp. 1973); LA. REV. STAT. ANN. §§ 42:1143(D)(1)-(2) (1965); N.Y. PUB. OFFICERS LAW § 73(2) (McKinney Supp. 1972).

178. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1291(4) (Supp. 1971); CAL. GOV'T CODE § 8920(b)(3) (West Supp. 1973); ILL. ANN. STAT. ch. 127, §§ 603-105 to -106 (Smith-Hurd 1967), *id.* § 602-104 (Smith-Hurd Supp. 1973); LA. REV. STAT. ANN. §§ 42:1143(D)(1)-(2) (1965); N.Y. PUB. OFFICERS LAW § 73(2) (McKinney Supp. 1972). Apparently, the fact that most statutes which cover the outsider assistance situation are made applicable only to appearances before state agencies or to the rendering of services with respect to matters before such agencies permits lawyer-legislators to maintain their private legal practices as much as possible. Since a state court is not a state agency, these statutes do not restrict such legislators from assisting outsiders in relation to court cases or from appearing in such cases. Thus, the dual objectives of conflict of interest legislation are neatly balanced.

179. In Massachusetts, the state or a state agency must have a "direct and substantial financial interest" in the matter. MASS. GEN. LAWS ANN. ch. 268A, § 4(c) (1970).

180. Under the New York statute, the member is prohibited from receiving compensation for the rendering of services with respect to any matter before a state agency if such "compensation is to be dependent or contingent upon any action by such agency," but he is permitted to assist outsiders where the compensation received is merely equal to the reasonable value of the services rendered. N.Y. PUB. OFFICERS LAW § 73(2) (McKinney Supp. 1972). Similarly, Arizona prohibits the receipt of compensation for the rendering of services where the compensation is dependent upon "any improper influence or improper action" by the member. ARIZ. REV. STAT. ANN. § 41-1291(4) (Supp. 1971).

181. The California act prohibits only the member's appearance or participation for profit with respect to licensing or regulatory matters before state professional licensing or regulation boards, CAL. GOV'T CODE § 8920(b)(3) (West Supp. 1973). In Illinois the legislator is prohibited from participation in or acceptance of a representation case before the state court of claims or industrial commission where the state is a party. *See* ILL. ANN. STAT. ch. 127 § 602-104 (Smith-Hurd Supp. 1973).

182. *See, e.g.*, LA. REV. STAT. ANN. §§ 42:1143(D)(1)-(2) (1965).

183. TEX. PENAL CODE ANN. art. 183-2.2 (Supp. 1972).

184. TEX. REV. CIV. STAT. ANN. art. 6422-9 § 6(1) (Supp. 1972).

before judicial bodies, either by express exceptions similar to section 5(e)(7) of the Pennsylvania Code or by the limited scope of the provisions themselves.¹⁸⁵

Since the coverage of Code section 5(d) is not limited to representative activity or state agency matters, the scope of the disclosure requirement is significantly broader than that of the corresponding provisions of other states' legislation. In this respect, the Pennsylvania Code would appear to be superior, since the actual and apparent conflicts of interest prevalent in the outside assistance situation exist on a broader plane than is covered by the provisions of other states' statutes. However, the Pennsylvania general assembly should follow the lead of those states which actually prohibit certain outside assistance and amend section 5(d) so as to forbid all compensated representation of outside interests before state agencies by members, except that which properly falls within section 5(e)(7). Such a prohibition would cover the conduct which presents the most obvious opportunities for favoritism and the clearest appearance of unethical conduct. With respect to the other forms of compensated outside assistance, the present disclosure requirement of section 5(d) appears adequate, but the representation presently exempted by section 5(e)(7) should also be subject to disclosure. Finally, it would be appropriate for the Pennsylvania general assembly to include a provision prohibiting any "person" from offering compensation to a legislator for representation of that "person" before a state agency, as is provided in the Massachusetts statute.¹⁸⁶ Such a provision would help deter the hiring of legislators solely for their influence.

*D. Outside Compensation and Discretionary Transfers
of Economic Value from Private Parties
to Legislators*

The obvious danger presented by the situation in which a legislator accepts gifts or compensation¹⁸⁷ from private parties is that such transfers

185. Those states with statutes which merely restrict assistance in relation to matters before state agencies exempt legislative participation in court cases by the very fact that the statutes apply only to agency matters, and courts are not included within the definition of agency. See note 178 *supra*. In Massachusetts, where the prohibition is not so limited, the statute expressly excludes assistance by the legislator with respect to the "collection of taxes, criminal fines or penalties, and fees or charges for permits or licenses, and corporation fees." MASS. GEN. LAWS ANN. ch. 268A, § 4(c) (1970).

One commentator, while recognizing the need to balance the dual objectives of conflicts legislation, argues that the better approach to the problem would be "to preclude legislative representation of private interests only before those agencies where egregious misconduct is likely or a demonstrable fact." Comment, *supra* note 7, at 388. This would probably provide a broader exemption than the provisions of the existing statutes, but it would be difficult to apply the suggested prohibition due to its lack of specificity and it could be included only in a general code of ethics, not a criminal statute.

186. MASS. GEN. LAWS ANN. ch. 268A, § 4(b) (1970).

187. Clearly, there is a difference between gifts and compensation in this context for the former denotes a transfer of value regardless of whether any services are

might influence the member to perform his public duties in a manner which may favor the donor. The clearest example of this situation is the case in which the legislator is paid to lobby for, or influence, the passage or defeat of a bill.¹⁸⁸ The principle underlying the prohibition of such gifts or compensation is simply that the member should be paid only by the government for such government service.¹⁸⁹

The first part of section 5(a) of the Pennsylvania Code effectively covers the outside gift or compensation situation by prohibiting the solicitation or receipt of any gift or compensation from an outsider which is intended to, or which would, influence the member's performance of his official duties.¹⁹⁰ The intent requirement refers to the state of mind of the transferor and not that of the legislator-recipient. The potential difficulties of proving that mental state are mitigated by the "or which would influence" language which apparently provides an alternative objective test. Nevertheless, the additional intent requirement of section 5(a), that the legislator himself know that the transfer is intended to, or would, influence him,¹⁹¹ greatly restricts the applicability of the prohibition because a dishonest legislator can merely deny such knowledge should he face prosecution.

Although it has been argued that "the establishment of a clear dollar limit for each calendar year would be the most promising method" of dealing with the situation,¹⁹² it is submitted that the receipt of a gift or compensation with knowledge or reason to know that it is intended to or will influence the legislator-recipient should be prohibited regardless of the size of the transfer because of the actual, potential, or apparent misconduct involved. This is especially so when appropriate exceptions have been provided to protect the legislator who receives legitimate gifts, as in Pennsylvania.¹⁹³ Not only does section 5(a) adequately cover the

rendered by the donee in exchange, although the donor may often expect or intend to influence the legislator's conduct through the gift. Compensation, on the other hand, denotes the transfer of a thing of value in exchange for, or in consideration of, the rendering of services by the legislator to the benefit of the transferor. See Legislative Code of Ethics §§ 3(4)-(5), PA. STAT. ANN. tit. 46, §§ 143.3(4)-(5) (1969). Nevertheless, both forms of transfer of economic value are often governed by the same statutory provision. See Legislative Code of Ethics § 5(a), PA. STAT. ANN. tit. 46, § 143.5(a) (1969).

188. See note 184 *supra*.

189. See Perkins, *supra* note 7, at 1119. To enforce this principle, one commentator has stated:

[P]ublic officials should not be allowed to accept transfers of economic value from private sources, even though no bribery is involved, if the transfer is at the discretion of the transferor as distinct from being pursuant to an enforceable contract or property right of the public official.

Id. (emphasis omitted).

190. Legislative Code of Ethics § 5(a), PA. STAT. ANN. tit. 46, § 143.5(a) (1969). The complete text of the Legislative Code of Ethics is set forth in an appendix to this Comment.

191. *Id.*

192. Comment, *supra* note 7, at 391. The author there argues that not all gifts are equally culpable and that this should be recognized by the statute. *Id.* at 390. However, a gift will at least create the appearance of impropriety, whatever its size.

193. See notes 195-201 and accompanying text *infra*.

general problem of outside gifts and compensation, problems of proof of intent aside, but the second part of that section specifically proscribes compensated lobbying by a legislator.¹⁹⁴ Moreover, section 5(a) must be commended for its express prohibition of a member's "sale" of his vote on a bill, since such conduct by a legislator is the grossest form of impropriety and abuse of office.

With respect to the outside compensation or gift situation, section 5(e) of the Code includes provisions expressly excepting certain types of gifts from the prohibition of section 5(a). Section 5(e)(1) permits the member to receive "bona fide reimbursement, to the extent permitted by law, for actual expenses for travel and such other necessary subsistence as is compatible with this act and for which no Commonwealth payment or reimbursement is made."¹⁹⁵ The reason for this exemption is apparently to permit the legislator to travel back and forth from Harrisburg to his home district in order to meet with his constituents, and to do whatever other traveling may be required in the performance of his duties without being forced to shoulder the entire cost himself. This is consistent with the need to balance the dual objectives of conflicts legislation.

A second exception is provided in section 5(e)(3) for the receipt of "[a]wards for meritorious public contribution given by public service or civic organizations,"¹⁹⁶ the purpose of which is obvious. Third, section 5(e)(5) allows members to accept campaign contributions for meeting campaign expenses.¹⁹⁷ Again, the need for balancing justifies this exception despite the obvious dangers,¹⁹⁸ because qualified men and women would

194. PA. STAT. ANN. tit. 46, § 143.5(a) (1969).

195. PA. STAT. ANN. tit. 46, § 143.5(e)(1) (1969). The effect of the phrase "to the extent permitted by law" is not clear.

There is some overlap between this exception and the one provided by the definition of "thing of economic value," which definition includes "any money or other thing having economic value except food, drink, or refreshments consumed by an official including reasonable transportation and entertainment incident thereto, while the personal guest of some person." Legislative Code of Ethics § 3(11), PA. STAT. ANN. tit. 46, § 143.3(11) (1969). Since section 5(a) prohibits the receipt of "any gift or compensation," which terms are defined to mean any "thing of economic value," the exception mentioned in the definition of the latter phrase would apply to section 5(a) by its own terms. See Legislative Code of Ethics § 3(4)-(5), PA. STAT. ANN. tit. 46, §§ 143.3(4)-(5) (1969).

196. PA. STAT. ANN. tit. 46, § 143.5(e)(3) (1969). Again there is some duplication with the exceptions created by the terms of section 5(a), since a "gift" excludes public awards. Legislative Code of Ethics § 3(5), PA. STAT. ANN. tit. 46, § 143.3(5) (1969). However, since section 5(a) also prohibits the receipt of compensation, the definition of which does not except public awards, the express exception of section 5(e)(3) is appropriate. Legislative Code of Ethics § 3(5), PA. STAT. ANN. tit. 46, § 143.3(4) (1969).

197. PA. STAT. ANN. tit. 46, § 143.5(e)(5) (1969). Duplication exists with respect to this exception as well, but the situation is similar to that with respect to section 5(e)(3) so the express exception of section 5(3)(7) is justified. Legislative Code of Ethics §§ 3(3), (4), PA. STAT. ANN. tit. 46, §§ 143.3(3), (4). See note 196 *supra*.

198. One authority on state government has stated:

[O]ur present method of financing political campaigns is, in my estimation, the single most corrupting factor in our political life — local, national, and especially state.

be greatly discouraged from running for office if they were prohibited from receiving campaign contributions and had to finance campaigns entirely on their own. However, while safeguards against misconduct are theoretically provided by the requirement that an accounting be made of most campaign contributions pursuant to the Election Code,¹⁹⁹ it is submitted that greater protection should be provided by expressly exempting only the receipt of political contributions for which an accounting is required and made.²⁰⁰

It must be recognized that the terms of section 5(a) itself exempt certain receipts because, by definition, "gift" and "compensation" do not include: (1) food and other refreshments, transportation, and entertainment while a "person's" personal guest; (2) bona fide loans, property, and contract interests; (3) public awards; and (4) certain political contributions.²⁰¹ Of course, these exceptions duplicate in part the applicable exemptions of section 5(e).

Very few of the other states which have adopted a statutory approach to legislative conflicts of interest have absolutely prohibited the receipt of any gifts from private parties by the legislator,²⁰² although several states have provisions which forbid the member's acceptance of compensation for his services from anyone other than the state.²⁰³ California and Louisiana prohibit gifts or compensation related to legislative matters with certain exceptions,²⁰⁴ while other statutes provide that no legislator

199. PA. STAT. ANN. tit. 25, §§ 3221-3233 (1963), *as amended*, PA. STAT. ANN. tit. 25, §§ 3227, 3213 (Supp. 1972). Despite the fact that the Election Code requires the filing of an expense account by a candidate for legislative office, the Pennsylvania courts have not been very active or strict in enforcing the requirements of the law. As one commentator has observed, "[t]he result of these decisions [under the Election Code] is that a candidate must file and must keep account of his finances, but will not be subject to sanctions if he does not follow the code as long as he claims ignorance of the law or of the violation or can show his error was without willful fraud or corruption." E.J. Tract, *Regulation of Campaign Finance in Pennsylvania*, March 22, 1972 (unpublished manuscript on file in Professor William Valente's office, Villanova University School of Law).

200. See note 199 *supra*.

201. Legislative Code of Ethics, §§ 3(4)-(5), PA. STAT. ANN. tit. 46, §§ 143.3(4)-(5) (1969). See notes 195-97 *supra*.

202. See KY. REV. STAT. ANN. § 61.096(2) (1971); WASH. REV. CODE ANN. § 42.22.040(1), (2) (1972).

203. See, e.g., CAL. GOV'T CODE § 8920(b)(4) (West Supp. 1973); FLA. STAT. ANN. § 112.313(7) (1973); LA. REV. STAT. ANN. § 42:1143(A) (Supp. 1973); MASS. GEN. LAWS ANN. ch. 268A, §§ 4(a), 11 (1970); TEX. REV. CIV. STAT. ANN. art. 6252-9.4(a) (Supp. 1972); WASH. REV. CODE ANN. §§ 42.22.040(1), (2) (1972). At least one commentator has asserted that the receipt of outside compensation would come within the general prohibition contained in several statutes "against the acceptance of employment which would impair the legislator's independent judgment in the exercise of his official duties." Comment, *supra* note 7, at 393. However, this general code of ethics standard would seem more obviously directed at restricting a legislator's freedom to accept private employment during his term and will be discussed in connection with respect to that situation. See notes 236-42 and accompanying text *infra*.

204. CAL. GOV'T CODE § 8920(b)(4) (West Supp. 1973); LA. REV. STAT. ANN. § 42:1143E(1), (3), (6) (1965). The California act exempts receipt of compensation for speeches or publications concerning the legislature and reimbursement for traveling expenses not paid by the state, while the Louisiana statute contains exceptions almost identical to those provided in the Pennsylvania Code.

shall accept any gift or service which is offered with the intent to improperly influence him in the performance of his official duties or responsibilities,²⁰⁵ or that might reasonably tend to so influence.²⁰⁶ Illinois and New York also prohibit the receipt of gifts in such a situation, but only where the value of the gift exceeds a specified dollar amount.²⁰⁷ Finally, although compensated lobbying would come within the general prohibition of receipt of compensation from an outside source for the performance of the member's official duties,²⁰⁸ only Illinois, in addition to Pennsylvania, specifically proscribes such conduct by a legislator.²⁰⁹

Section 5(a) would appear to be a more extensive prohibition than the comparable statutes of most other states. In the first part of that section, the general assembly has combined prohibitions found in the statutes of certain other states and, by prohibiting receipt of gifts or compensation which is either intended or which would influence the member's public performance, has avoided some of the vagueness which plagues statutes which contain only the "which would" language,²¹⁰ while making the section broader in scope than those statutes which only contain the intent requirement.²¹¹ However, due to the problems of proof presented by section 5(a)'s requirement of actual knowledge by the member, it is submitted that the Pennsylvania legislature should amend the section to require only constructive knowledge by providing a more objective test, such as the one contained in the New York statute.²¹²

205. See, e.g., N.J. REV. STAT. § 52:13D-14 (Supp. 1973).

206. See, e.g., FLA. STAT. ANN. 112.313(1) (1973); TEX. REV. CIV. STAT. ANN. art. 6252-9.4(a) (Supp. 1972).

207. Illinois proscribes the solicitation or receipt of gifts with an aggregate value of greater than \$100 from any one person in a calendar year where the circumstances reasonably create an inference that a major purpose behind the gifts was to influence the member's performance of his official duties. ILL. ANN. STAT. ch. 127, § 603-101 (Smith-Hurd 1967). In New York the legislator is prohibited from soliciting or receiving any gift greater than \$25 in value under similar circumstances. N.Y. PUB. OFFICERS LAW § 73(5) (McKinney Supp. 1972). See note 212 and accompanying text *infra*.

208. Comment, *supra* note 7, at 393.

209. ILL. ANN. STAT. ch. 127, § 602-101 (Smith-Hurd Supp. 1973), prohibits the member from paid lobbying but expressly permits him to lobby without compensation. Other states, including Pennsylvania, have lobbyist registration acts which establish disclosure requirements for lobbyists and those who hire them. See, e.g., MISS. CODE ANN. § 3372 (1957); PA. STAT. ANN. tit. 46, §§ 148.1-8 (1969). However, these provisions are not directed at the problem of paid lobbying by legislators and have been found to be ineffective due to the lack of vigorous enforcement. See Comment, *supra* note 7, at 394-97.

210. See note 205 *supra*.

211. See note 206 *supra*.

212. N.Y. PUB. OFFICERS LAW § 73(5) (McKinney Supp. 1972), which provides in pertinent part that no legislator shall receive a gift with a value greater than \$25 "under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties." Not only is this standard more objective and thus easier to apply than that of section 5(a) of the Pennsylvania Code, but it also protects the public's confidence in its legislature since it is aimed more at the appearance of misconduct than any actual unethical behavior. See Legislative Code of Ethics § 2(3), PA. STAT. ANN. tit. 46, § 143.2(3) (1969). Of course, this standard could be used in conjunction with the subjective standard of section 5(a) so that the receipt of gifts or compensation is proscribed where the recipient knows, or the https://digitalcommons.ilvillanova.edu/vlr/vol19/iss1/art2 that it was intended to influence him.

With respect to the second part of section 5(a), the Pennsylvania Code is more praiseworthy than the statutes of every state except Illinois in its express prohibition of compensated lobbying. Although such activity would be condemned under the more general prohibitions in the statutes of other states, the express proscription of a member's receipt of compensation for voting a particular way on legislation makes section 5(a) more complete.

Finally, although section 5(a)'s prohibition is extensive, its effectiveness would be increased by the inclusion of a sentence prohibiting "persons" from giving, or offering to give, anything of value to a member when his receipt thereof would be illegal. Such a prohibition is included in the statutes of several other states,²¹³ and has the purpose of deterring outsiders from attempting to "buy" a legislator's influence or services.

E. Confidential Information

A fifth conflict of interest principle is simply that "[p]ublic officials should not be permitted to [disclose or] use for personal economic gain confidential information acquired in their official capacities."²¹⁴ When a public official violates this principle, there may be neither specific harm to the government nor any injury to a particular private party. The evil or wrong involved is the official's satisfaction of his personal interest through the use of information which belongs to the government and the general public.²¹⁵ The official has exploited his public position to his personal advantage.

Although it has been stated that "[t]his conflict of interest is so obvious that any specific legislation would seem almost unnecessary,"²¹⁶ the Pennsylvania general assembly apparently was extremely concerned about the confidential information situation for it included five provisions in the Code which are directly applicable to the problem. In the standards of conduct section, there are two confidential information provisions: section 4(2) which forbids disclosure or use to further the member's personal interests,²¹⁷ and section 4(1) which proscribes acceptance of employment which would require such disclosure.²¹⁸ Among the criminal prohibitions, section 5(f) prohibits use of the information by the public officer²¹⁹ and section 5(g) prohibits disclosure of such information to others.²²⁰ The only possible significant difference between sections 4(2) and 5(f) is that the former proscribes a member's use of the in-

213. See, e.g., MASS. GEN. LAWS ANN. ch. 268A, § 4(b) (1970); N.Y. PUB. OFFICERS LAW § 73(5) (McKinney Supp. 1972).

214. Perkins, *supra* note 7, at 1121-22 (emphasis omitted).

215. Perkins, *supra* note 7, at 1122.

216. Note, *supra* note 64, at 686.

217. PA. STAT. ANN. tit. 46, § 143.4(2) (1969). The full text of the Legislative Code of Ethics is set forth in an appendix to this Comment.

218. *Id.* § 143.4(1).

219. *Id.* § 143.5(f).

220. *Id.* § 143.5(g).

formation "to further his personal interests" while the latter provision forbids such use "for private gain."²²¹ There would appear to be no real difference between the two phrases, except that the latter phrase may more clearly connote the pecuniary or economic interests of the member.

With respect to section 4(2) and section 5(g), the difference in terminology may be more significant in that the former provision speaks in terms of improper disclosure, while the latter provides that no confidential information "shall be disclosed by a member to others for purposes of their use for private gain, in circumstances where the use of such information by the member would violate" section 5(f).²²² Thus, mere disclosure is not sufficient to violate section 5(g). However, this section is open to four possible readings. First, it could mean that the member must disclose the information with the intent that the outsider use it for private gain, and the outsider must actually use it in such a way that he would thereby violate section 5(f) if he were a legislator; *i.e.*, he must actually use it for private gain. Second, section 5(g) might require only that the member disclose information with the intent that the outsider use it for private gain, and the information be such that its use by the member under those circumstances would violate section 5(f). Third, section 5(g) might mean that the "persons" to whom the information is disclosed must use the information for private gain and that their use must be such that a legislator so using it would violate section 5(f). However, such a reading would render section 5(g) internally redundant by including two identical requirements that the recipient of the information use it for private gain. The final possibility is that not only must the outsider actually use the information for his private gain, but also the member's disclosure must be for the member's private gain.²²³ Of these alternative readings, the first or second appears the most correct.

The fifth provision of the Code applicable to the confidential information problem is section 5(b).²²⁴ This section prohibits certain forms of disclosure only where the member receives "compensation or anything of economic value" for any consultations based upon or relating to specified information.²²⁵ None of the other provisions of the Code require the receipt of compensation, except perhaps section 5(g) under the fourth possible interpretation of that section suggested above.

221. *Id.* §§ 143.4(2), 5(f). Another difference between the two sections is that section 4(2) speaks in terms of "confidential information required by him in the course of his official duties," and section 5(f) of "any information not available to the public at large and acquired by him solely by virtue of his position." *Id.* The difference, however, is insignificant; information not available to the public at large is merely a definition of confidential information.

222. *Id.* § 143.5(g).

223. This latter requirement that the disclosure must be for the private gain of the disclosing member would be similar to the requirement of section 5(b) that the disclosure of the information must be compensated or in exchange for something of economic value. *Id.* § 143.5(b).

224. *Id.* § 143.5(b).

225. *Id.*

Section 5(b)(2) forbids the compensated disclosure of information which "is devoted substantially to the responsibilities, programs, or operations of the General Assembly."²²⁶ The purpose of this provision is to prevent divulgence of the workings of the state legislature and it covers information readily available only to members. Thus, section 5(b)(1) merely prohibits the most probable violations of the confidential information principle with respect to legislators, although it is not absolutely clear that the information disclosed must necessarily be confidential. While section 5(b)(2) may be nothing more than a prohibition of the compensated disclosure of confidential information, with "official data or ideas which have not become part of the body of public information"²²⁷ being merely another definition of confidential information, the section probably deserves a broader reading. Since the prohibition covers consultation which "draws substantially upon" such information,²²⁸ it would apparently proscribe consultation which is merely based on confidential information, even though no such information is itself disclosed.²²⁹ Such compensated consultation would in effect be a use of such information by the legislator for private gain and would seem to come within the prohibition of section 5(f) as well as that of section 5(b).

Since compensation, or the receipt of anything of economic value, is an element of the offense established by section 5(b), the exceptions contained in sections 5(e)(1), (3), and (5)²³⁰ would apparently apply. Thus, if the member's compensation for his consultation consisted of reimbursement for travel expenses, a public award, or a campaign contribution, the legislator would be exempt from section 5(b) prohibitions. Further, the exceptions inherent in the definition of a "thing of economic value" would be applicable to a section 5(b) case.²³¹

It is apparent from the above discussion that the approach taken by the Pennsylvania Code to the problem of confidential information is quite confusing, duplicative, and gives little concrete guidance to legislators as to what is proper conduct. In other states, the use of confidential information by a state legislator for his personal gain or economic advantage and his disclosure of such information to other persons is almost universally condemned.²³² Section 5(g) of the Pennsylvania

226. *Id.* § 143.5(b)(2).

227. *Id.*

228. *Id.*

229. An example would be a situation in which there is confidential information within the legislator's knowledge that a state highway is to be built with the resultant condemnation of land in a given area. The member could consult with an outsider for compensation and advise him to purchase land in the area without telling the outsider of the proposed highway. The consultation would draw upon or be based upon the confidential information though none would actually be disclosed.

230. *Id.* §§ 143.4(e)(1), (3), (5). See notes 195-201 and accompanying text *supra*.

231. Legislative Code of Ethics § 3(11), PA. STAT. ANN. tit. 46, § 143.3(11) (1969). See notes 195-201 and accompanying text *supra*.

232. ARIZ. REV. STAT. ANN. § 41-1291(3) (Supp. 1971); CAL. GOV'T CODE § 8920(h)(2) (West Supp. 1973); FLA. STAT. ANN. § 112.313(5) (1973); ILL. ANN. STAT. ch. 127, § 603-604 (Smith-Hurd 1967); LA. REV. STAT. ANN. § 42:1143(B) (1965); MASS. GEN. LAWS ANN. ch. 268A, § 23(c) (1970); N.Y.

Code might be different from the disclosure prohibitions in other states since that section, although ambiguous, may require the recipient to make some use of the confidential information. In other states the member's disclosure alone is forbidden. However, the statutes of several states go beyond a mere use/disclosure prohibition and provide, similarly to section 4(1) of the Pennsylvania Code, that no member shall accept any outside employment or engage in any business which would or might require him to disclose information not available to the public at large.²³³ Only Louisiana has a prohibition similar to section 5(b) of the Code.²³⁴ It is submitted that the general assembly should prohibit the simple disclosure of confidential information and its use for private gain and retain present section 4(1) with respect to outside employment in a general code of ethics.²³⁵ Such an approach would be in line with the statutes of other states and would adequately cover the problem.

F. Extra-Legislative Employment

The dangers sought to be averted in the extra-legislative employment situation are improper influence of the member's performance of official responsibilities and impairment of his independence of judgment with respect to public matters. The principle is broad — the legislator should not accept employment with, or render services to, private interests that are incompatible with his public duties and responsibilities.²³⁶ However, the problem of making the cost of governmental employment

PUB. OFFICERS LAW § 74(3)(c) (McKinney Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 6252-9, § 4(f) (Supp. 1972); WASH. REV. CODE ANN. § 42.22.040(6) (1972). Most of the prohibitions are phrased in almost the same language as the general principles stated in the text, *see* text accompanying note 214 *supra*, although there is some variation with respect to whether the prohibition is of use for economic gain, for furtherance of personal interests, or for the legislator's own advantage or benefit.

In the Arizona and California statutes, however, there is the added requirement that the disclosure of the inside information be knowing and willful, apparently because these states rely upon criminal sanctions.

In Louisiana, the statutory prohibition is totally different from all other states, except Pennsylvania, providing that no member shall receive compensation for any consultation the subject matter of which involves matters or operations of the state legislature or draws substantially upon confidential information. LA. REV. STAT. ANN. § 42:1143(B) (1965).

233. ARIZ. REV. STAT. ANN. § 41-1291(2) (Supp. 1971-72); CAL. GOV'T CODE § 8920(b)(1) (West Supp. 1973); FLA. STAT. ANN. §§ 112.313(4) (1973); MASS. GEN. LAWS ANN. ch. 268A, § 23(b) (1970); N.Y. PUB. OFFICERS LAW § 74(3)(b) (McKinney Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 6252-9.4(g) (Supp. 1972); WASH. REV. CODE ANN. § 42.22.040(5) (1972). All of these statutes, except those in New York and Massachusetts, proscribe acceptance of employment which would reasonably be expected to require, or which the member has reason to believe would require, disclosure. New York and Massachusetts merely forbid employment which would require disclosure.

234. LA. REV. STAT. ANN. § 42:1143(B) (1965).

235. *But see* Comment, *supra* note 7, at 389, wherein it is asserted that the employment restriction adds little if anything to the basic use/disclosure prohibition.

236. This principle would cover some of the situations previously discussed, particularly the situation dealing with assistance to outsiders. *See* notes 152-86 and accompanying text *supra*. However, the extra-legislative employment principle is much broader than the specific situations previously discussed.

prohibitive arises in this situation, and again a balance must be struck between the dual objectives of conflicts of interest legislation.²³⁷

Apparently sensitive to this problem, the legislatures of the states which have dealt with the extra-legislative employment situation have couched their restrictions in general terms. Some statutes merely prohibit a legislator from using or attempting to use his public office to secure unwarranted privileges,²³⁸ a provision which would apply to almost every conflicts situation. More specific are those provisions which forbid the use of the legislator's office to engage in transactions which conflict with the proper performance of the member's public duties.²³⁹ Several state statutes also provide that no legislator shall accept other employment which will impair his independence of judgment in relation to public matters.²⁴⁰

The only provisions of the Pennsylvania Code applicable to this situation are section 4(3), which prohibits the use of official position "to secure unwarranted privileges"²⁴¹ and section 4(1), which forbids the acceptance of outside employment which will require the divulgence of confidential information.²⁴² Because the former provision is so broad and gives no real guidance with respect to extra-legislative employment and since the latter provision is more specifically directed at confidential information, it is submitted that the general assembly should add a prohibition which states the general principle and provides that no legislator should accept employment which will impair his independence of judgment in legislative matters. Such a prohibition would be quite general, but could be appropriately included among the section 4 standards of conduct.

G. Post-Legislative Service

The principle underlying post-legislative service restrictions is that "[f]ormer public officials should not, within certain narrow limits of time and degree of connection with their former responsibilities, be allowed to assist private entities or persons in their dealings with government."²⁴³ This principle could be stated more broadly to proscribe any post-employment activities of the member which directly involve the government or might require the legislator to use his governmental in-

237. Comment, *supra* note 7, at 379.

238. See, e.g., FLA. STAT. ANN. § 112.313(3) (1973); MASS. GEN. LAWS ANN. ch. 268A, § 23(d) (1970); N.Y. PUB. OFFICERS LAW § 74(3)(d) (McKinney Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 6252-9, § 4(d) (Supp. 1972); WASH. REV. CODE ANN. § 42.22.040 (1972).

239. See, e.g., ARIZ. REV. STAT. ANN. § 41-1291(1) (Supp. 1971); CAL. GOV'T CODE § 8920(a) (West Supp. 1973); MINN. STAT. ANN. § 3.88(1)(b) (1967); N.Y. PUB. OFFICERS LAW §§ 74(2), (3)(e) (McKinney Supp. 1972); WASH. REV. CODE ANN. § 42.22.030 (1972).

240. See, e.g., ARIZ. REV. STAT. ANN. § 41-1291(2) (Supp. 1971); CAL. GOV'T CODE § 8920(b)(1) (West Supp. 1973); FLA. STAT. ANN. § 112.313(6) (1973); ILL. ANN. STAT. ch. 127, § 603-201 (Smith-Hurd 1967); MASS. GEN. LAWS ANN. ch. 268A, § 23(a) (1970); MINN. STAT. ANN. § 3.88(1)(a) (1967); N.Y. PUB. OFFICERS LAW § 74(3)(a) (McKinney Supp. 1972).

241. PA. STAT. ANN. tit. 46, § 143.4(3) (1969).

243. Perkins, *supra* note 7, at 1121.

fluence. The restrictions imposed are intended to supplement those governing the activities of the member during his term and seek to prevent the ex-legislator from using influence derived from his contacts and associations, or confidential information acquired during his term, for his personal gain or for the benefit of others.²⁴⁴ Again, the need to balance the dual objectives of conflicts of interest legislation is obvious because the insecurity of legislative service usually means that the member may return to a private job at the end of his term. At least one commentator has suggested that any post-legislative employment restrictions are of doubtful advisability and create an unreasonable deterrent to public service.²⁴⁵

Few state statutes include provisions restricting the post-legislative activities of their state legislators. In Massachusetts, a former government employee is barred for life from acting as an agent or attorney and from receiving compensation in relation to any particular matter in which he participated as a government employee and in which the state is a party or has a direct and substantial interest.²⁴⁶ In addition, Massachusetts bans, for one year, the former employee from appearing on behalf of another person before any state court or agency with respect to any matter in which the state is a party or has a direct and substantial interest, provided the matter was within the ex-employee's official responsibility within two years before the termination of his public employment.²⁴⁷ New York on the other hand, merely prohibits a former legislator from accepting compensation for lobbying before either house within two years after the end of his term.²⁴⁸ While Mississippi prohibits a state legislator from having an interest in a state contract made within one year of the end of his term.²⁴⁹

There is no provision in the Pennsylvania Code which is directed at restricting the activities of the former legislator.²⁵⁰ Accordingly, it

244. Perkins, *supra* note 7, at 1121; Comment, *supra* note 7, at 383-84; Note, *supra* note 64, at 682-83.

245. Comment, *supra* note 7, at 385.

246. MASS. GEN. LAWS ANN. ch. 268A, § 5(a) (1970).

247. *Id.* § 5(b). Sections 5(c) and (d) of the Massachusetts statute impose restrictions similar to those of sections 5(a) and (b) on partners of former public servants. *Id.* §§ 5(c), (d). The federal conflicts of interest act is similar to the Massachusetts statute with respect to post-governmental activities restrictions, 18 U.S.C. § 207 (1970), except that the Massachusetts act expressly provides that a state legislator is not precluded from acting as a private legislative counsel or agent any time after his term. MASS. GEN. LAWS ANN. ch. 268A, § 5 (1970).

248. N.Y. PUB. OFFICERS LAW § 73(7) (McKinney Supp. 1972). Although on its face this provision would appear much narrower than the prohibitions in the Massachusetts statute, the effect of the New York provision on the state legislators may actually be more restrictive. The Massachusetts act applies to public officials and employees generally, and with respect to legislators it prohibits only activity for private parties with respect to legislative matters, since the former legislator would probably have participated in or had responsibility over only such matters. The Massachusetts act does not prohibit compensated lobbying by the ex-legislator because the definition of "particular matter" excludes the enactment of general legislation. MASS. GEN. LAWS ANN. ch. 268A, § 1(k) (1970).

249. MISS. CONST. art. 4, § 109; MISS. CODE ANN. §§ 2301, 2302 (1957).

250. All of the prohibitions of section 5 of the Code speak in terms of members, which digital commons law does not include former legislators. See Legislative Code of

would be appropriate for the general assembly to amend the Code to include a provision prohibiting a former member, for a one or two year period, from receiving compensation for assisting a private "person" with respect to matters which were before the general assembly during the member's term. The Code should, at least, include a one or two year ban on compensated lobbying by the former legislator.²⁵¹ A broader restriction would have little more applicability,²⁵² and the narrow restrictions suggested would eliminate the most obvious possibilities for abuse without absolutely prohibiting post-term activity or making the cost of legislative service unduly restrictive.²⁵³

IV. PENALTIES, REMEDIES, DISCLOSURE AND ENFORCEMENT

A. Penalties and Remedies

The Pennsylvania Legislative Code of Ethics relies heavily upon criminal sanctions for the enforcement of its provisions. Section 6(a) provides that a violation of section 5 is a misdemeanor for which a legislator may be fined not more than \$1000 plus costs and, upon default in payment of any fine imposed, imprisoned for up to two years.²⁵⁴ Since violation of section 5 constitutes a misdemeanor, a violating legislator would also be required to forfeit his office as a result of conviction.²⁵⁵

Section 7 of the Code provides for civil remedies, which supplement the criminal sanctions available for violations of section 5, and provide the sole remedies for violations of section 4. These remedies were apparently added with the assumption that the imposition of criminal sanctions is not a totally effective or satisfactory means of furthering the purposes of the act.²⁵⁶ Although a few other states provide for civil remedies in

Ethics § 3(6), PA. STAT. ANN. tit. 46, § 143.3(6) (1969). See note 20 *supra*. However, the general prohibition of section 4(3) might have some applicability in this situation. PA. STAT. ANN. tit. 46, § 143.4(3) (1969).

251. But see Comment, *supra* note 7, at 385; text accompanying note 141 *supra*. The problems of determining when the legislator's employment ended and when the matter was before the legislature would not arise as they do with respect to other government officials and employees because of the legislator's fixed term and the general assembly's determinate sessions. See Buss, *supra* note 5, at 347-48.

252. See note 248 *supra*.

253. See Note, *supra* note 64, at 683.

254. PA. STAT. ANN. tit. 46, § 143.6(a) (1969). Section 6(b) provides that any fine imposed under section 6(a) shall be paid into the state's general fund. *Id.* § 143.6(b). Section 6(a) may be of doubtful constitutionality, at least in certain situations, for if it could be shown that a legislator convicted for violating section 5 was unable to pay the fine imposed because he lacked the necessary funds, imprisonment of the member for such a default would be violative of the equal protection clause of the fourteenth amendment. Cf. Tate v. Short, 401 U.S. 395 (1971). If the member merely refused or neglected to pay the fine, the equal protection clause would not bar his incarceration.

255. PA. STAT. ANN. tit. 65, § 121 (Supp. 1973) provides, in effect, that a public officer who pleads guilty or nolo contendere or is convicted in a court of record for any misdemeanor in office shall forfeit his office and the sentence imposed shall include a direction of removal from office.

their conflicts legislation,²⁵⁷ Massachusetts is the only state which expressly provides for civil remedies as extensive as those contained in section 7 of the Pennsylvania Code.²⁵⁸

Section 7(a) authorizes any agency head²⁵⁹ who has the final authority to approve or execute a state contract to cancel or rescind any such contract "without further liability to the Commonwealth where he finds that a violation of this act has influenced the making of said contract."²⁶⁰ The finding that the contract was tainted must be made in accordance with the Pennsylvania "Administrative Agency Law"²⁶¹ and is subject to judicial review,²⁶² thus protecting the private contractor from an attempt to use section 7(a) as a means of evading a burdensome contract. Moreover, an action for rescission or cancellation may not be initiated until the appropriate house or senate ethics committee finds that a violation has occurred.²⁶³ This requirement greatly reduces the effectiveness of the rescission remedy because the history of the legislative ethics committees in Pennsylvania has been one of inaction.²⁶⁴

The final condition attached to the section 7(a) remedy is that "such rescission shall be limited so as not to affect adversely the interests of innocent third parties."²⁶⁵ This proviso means that the right to rescind should not be exercised to the detriment of innocent private contractors or other outsiders affected by the contract. Also, it apparently allows partial rescission of the contract and might authorize the repayment of money or return of property to the private contractor.²⁶⁶

In addition to the rescission remedy provided in section 7(a), section 7(c) authorizes the attorney general to bring a civil action on behalf of

257. The Florida, New Jersey, and New York statutes provide that a violation of the statutory prohibitions or standards is grounds for suspension, dismissal, or removal from office, while Texas authorizes the cancellation of any contract or other arrangement binding on the state which was made through a violation of the statute. FLA. STAT. ANN. § 112.317 (1973); N.J. REV. STAT. § 52:13D-23(d) (Supp. 1973); N.Y. PUB. OFFICERS LAW § 74(4) (McKinney Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 6252-9, § 7 (Supp. 1972).

258. MASS. GEN. LAWS ANN. ch. 268A, § 9 (1970) provides for cancellation or rescission of contracts tainted by a violation of the act, and recovery by the state of damages equal to the amount of economic advantage obtained by the public official through violation of the act or \$500, whichever is greater.

259. See Legislative Code of Ethics § 3(2), PA. STAT. ANN. tit. 46, § 143.3(2) (1969).

260. PA. STAT. ANN. tit. 46, § 143.7(a) (1969).

261. *Id.* tit. 71, §§ 1710.1 *et seq.* (1962).

262. Legislative Code of Ethics § 7(b), PA. STAT. ANN. tit. 46, § 143.7(b) (1969). The agency head is empowered to suspend the contract pending judicial review of his determination.

263. Legislative Code of Ethics § 7(a), PA. STAT. ANN. tit. 46, § 143.7(a) (1969).

264. Legislative ethics committees have generally proved to be ineffective vehicles for policing legislative conduct. Unfortunately this also has been the case in Pennsylvania. See notes 308-12 and accompanying text *infra*.

265. PA. STAT. ANN. tit. 46, § 143.7(a) (1969).

266. See, Buss, *supra* note 5, at 383. The earlier provision in section 7(a) to the effect that the rescission or cancellation may be without further liability to the state might be read as foreclosing any monetary repayment or property return, but the section uses the word "may," indicating that the agency head has the discretion to provide for some disability with no return to the private contractor that which he has supplied under contract.

the state against a legislator who has violated the Code to recover the amount of any economic advantage gained.²⁶⁷

By authorizing restitution to the state for the amount of "economic advantage" gained, the problem of determining the actual damages caused by the violation is avoided. It should be noted that the unwarranted economic gain is recoverable only by the state, regardless of any losses that might have been suffered by private parties.²⁶⁸ It is submitted, however, that if the legislature desires a strictly enforced code of ethics, some thought should be given to the merits of creating a private cause of action analogous to section 7(c), allowing private parties to sue for damages suffered stemming from the Code violation, or, at the least, to interplead for the sums recovered by the state when actual damages are proved. Providing the impetus of private enforcement to the Code would restore some of the vitality previously lost because of the inhibitions to intramural enforcement,²⁶⁹ and would appropriately render the lawmaker liable to private parties when he has breached their trust. Spurious, harassing claims against legislators would be minimal if — as under 7(c) and 7(b) — the civil action could not be initiated without an affirmative finding of wrongdoing by the appropriate legislative ethics committee.

Finally, section 7(e) authorizes the legislator who was responsible for hiring a legislative employee to dismiss, suspend, or take other appropriate action upon a finding that the employee has violated the Code.²⁷⁰ Such action may be taken by the legislator upon his own finding of misconduct, and must be taken if ordered by the appropriate ethics committee upon its finding of a violation.²⁷¹ Nothing in this section or any other provision of the Code provides for the disqualification or removal of a legislator, as opposed to a legislative employee, but, under another statute, a legislator is subject to forfeiture of office upon conviction for violation of section 5.²⁷² Since section 7(e) is to be enforced by individual legislators and the legislative ethics committees, the problem of intramural enforcement plagues the provision as it does other parts of section 7.

B. Disclosure

Disclosure requirements are essentially preventative measures.²⁷³ The information disclosed provides a useful enforcement tool since it

267. PA. STAT. ANN. tit. 46, § 143.7(c) (1969). As under section 7(a), however, the attorney general cannot bring an action under section 7(c) until an affirmative finding of a violation of the Code has been made by the appropriate legislative ethics committee. *Id.* Also, the civil action must be brought within two years of the discovery of the occurrence of the alleged violation or within four years after the actual occurrence of the misconduct, whichever period is shorter. *Id.* § 143.7(d).

268. See Buss, *supra* note 5, at 383-84.

269. See notes 308-11 and accompanying text *infra*.

270. PA. STAT. ANN. tit. 46, § 143.7(e) (1969).

271. *Id.*

272. *Id.* tit. 65, § 121 (Supp. 1973). Violation of the Code would also be grounds for impeachment of the legislator. PA. CONST. art. 6, § 6.

273. See, e.g., *Charles W. Wicker School of Law Digital Repository*, 1873, 257, 260 (1964).

gives the enforcement agencies a list of the legislator's possibly conflicting interests.²⁷⁴ Theoretically, disclosure also reduces the possibility of a member's exploitation of his position or use of his influence, since it may be presumed that the legislator will be deterred from acting in his own interest if the agencies with which he deals, as well as the public, are aware of his potentially conflicting interests.²⁷⁵ Finally, full public disclosure serves to increase the apparent integrity of government and to maintain the public's confidence in its elected officials by affording the public the opportunity to more effectively evaluate the conduct of the legislators and by dispelling the impression that decisions of governmental bodies are rigged or influenced.²⁷⁶ Of course, the need to balance the dual objectives of conflicts regulation is present since a requirement that the legislator disclose his personal interests tends to infringe upon the privacy of the member.²⁷⁷ However, this invasion is justified to the extent that taking public office of necessity results in some expected loss of privacy, and because the alternative — divestment — would make the cost of public service much more prohibitive.²⁷⁸

The Legislative Code of Ethics makes disclosure a condition precedent to the undertaking of certain conduct. In this way the requirement demands affirmative action and is violated by the member's failure to make the required disclosure. The narrow requirement of section 5(d) provides for disclosure by the member to the house clerk or senate secretary of all compensated assistance to outsiders in "transactions involving the Commonwealth."²⁷⁹ Under this section, the member must file a written statement containing: (1) his name and address; (2) the name and address of the "person" assisted or to be assisted; and (3) "whether the amount of compensation for services rendered or to be rendered is (i) one thousand dollars (\$1000), or more, or (ii) less than one thousand

274. See, Krasnow & Lankford, *supra* note 6, at 285; Note, *supra* note 66, at 1230. This discussion will be limited to disclosure by legislators while in office and will not involve an examination of the disclosure requirements often imposed upon candidates for legislative office.

275. See, Note, *supra* note 64, at 682.

276. See, Case, *supra* note 273, at 261; Note, *supra* note 5, at 461. With respect to congressional disclosure requirements, Krasnow & Lankford made the following observation which is equally applicable at the state level:

Public disclosure, as long as the extent of reporting required is sufficiently extensive to cover those circumstances from which a conflict of interest might be inferred, is an important step in fostering public confidence in the integrity of Congress as an institution. This remedy avoids the extreme solution of outlawing all outside sources of income, dealings in stock, and receipt of fees for any reason.

Krasnow & Lankford, *supra* note 6, at 284.

277. For extensive analyses of disclosure, invasion of privacy, and the constitutional problems created thereby, see Comment, *Public Officials: The Constitutional Implications of Mandatory Public Financial Disclosure Statutes, and a Proposal for Change*, 1971 L. & Soc. ORDER 104; Comment, *Financial Disclosure by Public Officials and Public Employees in Light of Counsel-by-the-Sea v. Young*, 18 U.C.L.A.L. REV. 534 (1971).

278. See Krasnow & Lankford, *supra* note 6, at 284; Comment, *supra* note 6, at 400.

279. PA. STAT. ANN. tit. 46, § 1435(d), (1969). See notes 35, 156-74 and accompanying text *supra*.

dollars (\$1000);" and (4) a description of the transaction and nature of the member's services.²⁸⁰ The disclosure statement to the clerk or secretary is then "deemed confidential and privileged" unless a public hearing is convened for the purpose of investigating an alleged violation.²⁸¹

The statement must be filed within 10 days of the member's receipt or entry into an agreement to receive compensation.²⁸² Since the language is disjunctive, it could be interpreted as affording the legislator the alternative of filing within 10 days of entering into a compensation agreement or disclosing within 10 days of the date the compensation is actually received pursuant to the agreement, a time which could be long after the rendering of the assistance. To prevent such an interpretation, the general assembly should amend section 5(d) to provide that the filing must be within 10 days of the date of compensation or agreement, whichever comes first.

It has been asserted, with respect to provisions similar to section 5(d), that the requirement that the statement filed be kept confidential and made public only in connection with a public hearing for a violation of the Code²⁸³ strikes an appropriate balance by protecting the public from misconduct without unnecessarily invading the privacy of the legislator.²⁸⁴ However, it is submitted that this approach undercuts one of the basic rationales of the disclosure requirement: that the legislators will think twice before entering into conflict situations when exposed to the glare of public scrutiny.²⁸⁵ At the least, the statement should be given to any state agency or official involved in the state transaction with respect to which the member's assistance is afforded.²⁸⁶

Although it is widely acknowledged that disclosure in some form is necessary for truly effective conflict of interest legislation,²⁸⁷ there is considerable variance among the states as to the appropriate type of requirement. The most common provision requires that if a legislator, or a member of his immediate family, is an officer, director, agent, or salaried employee

280. PA. STAT. ANN. tit. 46, § 143.5(d) (1969). If the member in question is a representative or house employee, he must file the statement with the chief clerk of the house, while a senate employee files with the secretary of the senate.

281. *Id.*

282. *Id.*

283. *Id.*

284. See Note, *supra* note 151, at 457.

285. See note 275 and accompanying text *supra*. A former official of the Pennsylvania Liquor Control Board has recommended that administrative operations be made public, stating:

If no secrets as to special requests and/or treatment are kept from the public, then the public would become more reassured of the impartiality of board decisions, and people would have second thoughts before asking for any special treatment.

Philadelphia Inquirer, *supra* note 174, at 2, col. 2.

286. A bill has been proposed by Representative William H. Yohn, the present chairman of the House Ethics Committee, that would require a more particular financial disclosure by members available for public inspection. H.B. No. 1306 General Assembly of Pennsylvania (1973 Sess.). See also Philadelphia Evening Bulletin, Aug. 3, 1973, § 1, at 3, col. 6. See note 174 and accompanying text *supra*.

287. Note, *supra* note 174, at 461.

of, or owns a substantial interest in, any business entity subject to state regulation, he must file a statement disclosing the nature and extent of such relationship or interest.²⁸⁸ In addition, the New York act requires disclosure, in the member's discretion, of all other possibly conflicting interests,²⁸⁹ and the Texas statute provides that every member with a certain salary must annually disclose all sources of income, acquisitions, and investments of both himself and his spouse.²⁹⁰ A few other states impose significantly broader disclosure requirements. Arizona requires the disclosure of all offices and directorships held by a member in any business organized for the purpose of making a profit, regardless of whether the business entity in which the positions are held is subject to state regulation or doing business with the state.²⁹¹ Illinois mandates disclosure, subject to de minimis exceptions, of, *inter alia*: (1) the member's private professional practice, if any; (2) the recipient of professional services rendered by the legislator; (3) the name of any entity transferring a gift to the legislator; (4) the identity of any capital asset from which he has realized a capital gain in the preceding year; and (5) the nature and amount of any ownership interest in an entity doing business in that state.²⁹² Some states have more narrow provisions which require disclosure of: (1) any personal interest in a matter in which the legislator participates as a public official;²⁹³ (2) all business transactions with the state by the member or a "person" in which he holds an interest;²⁹⁴ or (3) all compensated assistance or appearances with respect to matters before state agencies or in which the state has an interest.²⁹⁵

It is submitted that the general assembly should amend the Code to include a provision similar to that employed by most other states, requiring disclosure of all relationships and interests of the member and his family in entities subject to state regulation. Moreover, the Pennsylvania legislature would do well to go further and mandate disclosure of all financial

288. See, e.g., FLA. STAT. ANN. § 112.313(2) (1973); N.Y. PUB. OFFICERS LAW § 73(6)(a)(1) (McKinney Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 6252-9, § 4(e) (Supp. 1972); VA. CODE ANN. § 2.1-358(d)(ii) (1973); WASH. REV. CODE ANN. § 42.22.050 (1972). Under all the provisions cited, the disclosure must be annual, and, except in Washington, the statement filed is open to public inspection.

289. In New York, the legislator must disclose any interest which he determines might reasonably be affected by legislative action or which should be disclosed in the public interest. N.Y. PUB. OFFICERS LAW § 73(6)(a)(3) (McKinney Supp. 1972).

290. TEX. REV. CIV. STAT. ANN. art. 6252-9, § 4(o) (Supp. 1972). Only those members with salaries in excess of \$11,000 are covered. *Id.*

291. Inexplicably, however, the Arizona statute does not cover other sources of income as proprietary interests. ARIZ. REV. STAT. ANN. § 41-1295(A)(1) (Supp. 1971).

292. ILL. ANN. STAT. ch. 127, § 604A-102 (Smith-Hurd Supp. 1973).

293. See CAL. GOV'T CODE § 8920(b)(5) (West Supp. 1973); MASS. GEN. LAWS ANN. ch. 268A, § 6 (1970); TEX. REV. CIV. STAT. ANN. art. 6252-9, § 4(f) (Supp. 1972).

294. See, e.g., N.J. REV. STAT. ANN. § 52:13D-18 (Supp. 1973).

295. See, e.g., ARIZ. REV. STAT. ANN. § 41-1295(A)(2) (Supp. 1971); LA. REV. STAT. ANN. § 42:1143(D) (1965). The Louisiana disclosure requirement is almost identical to that contained in the Pennsylvania Code. See Legislative Code of Ethics § 81(d) (Pa. Stat. Ann. tit. 46, § 1431(b)(1) (1969)).

interests of the solon, with perhaps a minimum dollar limit.²⁹⁶ These statements should be filed annually and be open to public inspection. In addition, the present section 5(d) should be retained to cover certain aspects of the outside assistance situation.²⁹⁷

In order to make the disclosure requirements fully effective, the Pennsylvania legislature should also enact a provision prohibiting false disclosure statements, such as that contained in the New York Act.²⁹⁸ It should be noted, however, that such a prohibition could be read into the disclosure requirements themselves by the Pennsylvania courts on the theory "that the obligation to file *truthful* statements is implicit in the obligation to file,"²⁹⁹ and because false filings undermine the purpose of the disclosure mandate and are often more harmful than no filing at all. However, such judicial construction might well encroach upon the legislative function and it is questionable whether the Pennsylvania courts would be willing to do so. Accordingly, an express statutory prohibition would appear to be appropriate.

C. Enforcement

The Legislative Code of Ethics does not provide for an enforcing mechanism to give meaning to its sanctions and standards, but assumes the formation of house and senate ethics committees. This assumption is apparent in section 7, which requires an affirmative finding by the "appropriate House or Senate Committee on Ethics" before either the section 7(a) contract rescission or section 7(c) civil action provisions may be implemented.³⁰⁰ However, neither the section 4 standards of conduct, nor the section 5 prohibitions and disclosure requirements make mention of an authorized role for an enforcing committee. Furthermore, no authority is granted the committees to issue advisory opinions, hold hearings, or initiate investigations. As a result of this initial failure to provide for a viable enforcing mechanism, and the apparent subsequent legislative indifference, the Code has remained generally ineffective in promoting legislative right conduct and public confidence in government.³⁰¹ Instead, the history of the Code seems unfortunately to have made a prophet of one perceptive commentator who, writing in 1959, stated:

[N]ot the least danger of the promulgation of a code of ethics is that the act of promulgation itself may tend to be looked upon by the responsible government as a panacea for conflict-of-interests problems, or may operate as a single symbolic gesture by which that government effectively washes its hands of the affair. Codes, how-

296. See recommended disclosure requirements, Comment, *supra* note 7, at 400.

297. See note 186 and accompanying text *supra*.

298. N.Y. PUB. OFFICERS LAW § 73(6) (c) (McKinney Supp. 1972).

299. See *GAF Corp. v. Milstein*, 453 F.2d 709, 710 (citation omitted) (emphasis in original) (2d Cir. 1971), noted in 17 VILL. L. REV. 734 (1972).

300. See Villanova University Charles Widener School of Law Digital Repository, 1973
301. See Philadelphia Evening Bulletin, *supra* note 286, at 3, col. 6.

ever, will be effective only insofar as they are elucidated, administered, enforced.³⁰²

To date, a senate ethics committee has never been formed. The house committee has almost matched this level of inactivity by holding no regular meetings, receiving no funding, and conducting only one investigation of a member in its history — and then only at the legislator's request.³⁰³

In providing, albeit obtusely, for intramural enforcement, Pennsylvania conforms with the vast majority of other states which place enforcement of their statutory conflicts of interest provisions in the hands of either an ethics committee in each house of the state legislature³⁰⁴ or a joint legislative committee.³⁰⁵ Only a few states provide for non-legislators on the committees,³⁰⁶ and of those, only three have established completely independent committees.³⁰⁷ This is despite the fact that commentators almost universally condemn entrusting of the policing responsibilities to legislator dominated bodies.³⁰⁸ Application and interpretation of the statutory mandates is a difficult and politically sensitive task, and the legislators themselves may either be tempted to exploit conflicts of their fellow members' interest for political gain or, because "[t]here is a rule of the [legislative] fraternity that no member shall expose publicly the transgressions of another,"³⁰⁹ may tend to be lax in enforcing the statutory prohibitions. This phenomenon has been termed the

302. Note, 107 U. PA. L. REV. 985, 1025-26 (1959).

303. Interview with Representative Frederick Schupnik, Chairman of the Pennsylvania House of Representatives Ethics Committee, in Harrisburg, Pa., Mar. 14, 1972. See Bulletin, *supra* note 286, at 3, col. 8.

304. See, e.g., FLA. STAT. ANN. § 112.318(1) (1973); MINN. STAT. ANN. § 3.89 (1967); WASH. REV. CODE ANN. § 44.60.020 (1970).

305. See, e.g., CAL. GOV'T CODE § 8940 (West Supp. 1973) (three members from each house); ILL. ANN. STAT. ch. 127, § 606-101 (Smith-Hurd 1967) (two members from each house); N.J. STAT. ANN. § 52:13D-22 (Supp. 1973) (four members from each house).

306. The Washington statute creates an eight man ethics committee for each house with four members who are not active legislators. WASH. REV. CODE ANN. § 44.060.020 (1970). In Texas, the code of ethics is enforced by an ethics commission comprised of three members of the house, three senators, and six other members, appointed two each by the chief justice of the state supreme court, the president judge of the court of criminal appeals, and the chairman of the state judicial qualifications committee. TEX. REV. CIV. STAT. ANN. art. 6252-9, § 8(a) (Supp. 1972).

307. Louisiana provides for a three member board of ethics for state elected officials; the governor appoints one member and each house elects one member, none of whom may be a member of that body. LA. REV. STAT. ANN. § 42:1144(A) (1965). Hawaii utilizes a state ethics commission, composed of five persons appointed by the governor from a list of ten candidates nominated by the state judicial council. These members may not hold any other public office. HAWAII REV. STAT. § 84-21 (Supp. 1972). The Kansas committee on governmental ethics consists of five members, none of whom may otherwise be in the public employ. Two members are appointed by the governor, and one each by the chief justice of the supreme court, the house speaker, and the senate president. KAN. STAT. ANN. § 75-4303(a) (Supp. 1972).

308. See Rhodes, *Enforcement of Legislative Ethics: Conflict Within the Conflict of Interest Laws*, 10 HARV. J. LEGIS. 373 (1973). See also Note, *supra* note 9, at 1231; Note, *supra* note 8, at 453.

309. Krasnow & Lankford, *supra* note 6, at 281. See Comment, *supra* note 7, at 372-428.

"conflict within the conflict of interest laws" and derives from the "[c]onformance to group-sanctioned standards which encourage civility, mutual assistance, cohesion, and institutional chauvinism" characteristic of legislative bodies.³¹⁰

Because of this general inability or unwillingness of legislatures to police themselves, most commentators agree that a special governmental agency or ethics commission should be established and put beyond legislative control with non-partisan, non-representative appointed members;³¹¹ "optionally [enforcement] should be entrusted to a broadly-based, independent body in order to promote public confidence in investigative impartiality and forestall suspicion that a violation has been 'white-washed.'"³¹²

It is submitted that the Pennsylvania general assembly should create such a body to interpret and apply the Legislative Code of Ethics. Such an independent ethics commission could, at the least, be delegated the duties presently assigned to the house and senate committees of ethics. It would then be responsible for determining the occurrence of a violation, a necessary prerequisite for both the cancellation or rescission of a tainted contract under section 7(a) and the bringing of a civil action for restitution under section 7(c). Such a commission could be given the authority now delegated to agency heads to cancel and rescind contracts, and the power presently left to the legislature, as a body, to dismiss, suspend, or take other appropriate action with respect to members found in violation of the Code. Finally, the commission could be delegated the responsibility for administering the disclosure requirements of section 5(d). Placing all these duties in the hands of a single independent body would not only assure effective enforcement and promote public confidence, but would also provide for a consolidation of functions and simplification of operation.

If such a commission is to be effective, it is submitted that the general assembly must delineate, by statute, the necessary power and authority.³¹³ For example, the commission should be empowered to receive and in-

310. Rhodes, *supra* note 308, at 281-82.

311. In order to assure that the commission remains as independent as possible, its members should not be appointed by only one person or body or even solely by governmental bodies or officials. For some possible appointing bodies and officials, see TEX. REV. CIV. STAT. ANN. art. 6252-9, § 8(a) (Supp. 1972); Comment, *supra* note 7, at 373 n.31; Note, *supra* note 66, at 1213. For a contrary opinion proposing a governor-elected commission, see Rhodes, *supra* note 308, at 396-99.

312. Comment, *supra* note 7, at 373. See Note, *supra* note 5, at 462-63; Note, *supra* note 9, at 1231. The use of such an independent commission "would allow the legislators themselves to set out the basic topics of concern, and the nonlegislators to apply them flexibly and usefully, providing a clearer guide to behavior and a deterrent to misbehavior." Note, *supra* note 9, at 1232. But see Krasnow & Lankford, *supra* note 6, at 281-85, wherein the authors suggest that such a proposal would not command enough support to be created at least on the federal level, and that a joint house-senate ethics committee would be the most feasible alternative.

313. The statutes of several states may serve as a model. See, e.g., CAL. GOV'T CODE §§ 8940-8955 (West Supp. 1973), LA. REV. STAT. ANN. § 42:1144 (1965) as amended, LA. REV. STAT. ANN. § 1144(E) (Supp. 1973); N.J. REV. STAT. §§ 52:13D-21, 52:13D-22, 52:13D-23, 52:13D-24, 52:13D-25, 52:13D-26, 52:13D-27, 52:13D-28, 52:13D-29, 52:13D-30, 52:13D-31, 52:13D-32, 52:13D-33, 52:13D-34, 52:13D-35, 52:13D-36, 52:13D-37, 52:13D-38, 52:13D-39, 52:13D-40, 52:13D-41, 52:13D-42, 52:13D-43, 52:13D-44, 52:13D-45, 52:13D-46, 52:13D-47, 52:13D-48, 52:13D-49, 52:13D-50, 52:13D-51, 52:13D-52, 52:13D-53, 52:13D-54, 52:13D-55, 52:13D-56, 52:13D-57, 52:13D-58, 52:13D-59, 52:13D-60, 52:13D-61, 52:13D-62, 52:13D-63, 52:13D-64, 52:13D-65, 52:13D-66, 52:13D-67, 52:13D-68, 52:13D-69, 52:13D-70, 52:13D-71, 52:13D-72, 52:13D-73, 52:13D-74, 52:13D-75, 52:13D-76, 52:13D-77, 52:13D-78, 52:13D-79, 52:13D-80, 52:13D-81, 52:13D-82, 52:13D-83, 52:13D-84, 52:13D-85, 52:13D-86, 52:13D-87, 52:13D-88, 52:13D-89, 52:13D-90, 52:13D-91, 52:13D-92, 52:13D-93, 52:13D-94, 52:13D-95, 52:13D-96, 52:13D-97, 52:13D-98, 52:13D-99, 52:13D-100, 52:13D-101, 52:13D-102, 52:13D-103, 52:13D-104, 52:13D-105, 52:13D-106, 52:13D-107, 52:13D-108, 52:13D-109, 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investigate complaints, as well as to investigate suspected misconduct on its own initiative.³¹⁴ The commission also should be authorized to hold hearings, consonant with the due process rights of the accused, and to subpoena witnesses and hear testimony.³¹⁵ The commission might be given the power to recommend the initiation of restitution actions, and to transmit its findings to the attorney general or local district attorney's office with recommendations for further investigation and possible prosecution.³¹⁶

The provision of two additional grants of authority would further aid an enforcing commission. First, the commission could be empowered to issue advisory opinions, either on request of a member or on its own initiative, which would constitute advice to a legislator with respect to the propriety of conduct in particular situations.³¹⁷ The opinions should be published, with the identity of the requesting member kept confidential, if necessary. The commission's findings and rulings made on complaints of code violations should also be published, deleting the name of any alleged violator exonerated of misconduct. These advisory opinions and rulings would be a helpful source of guidance to the legislators dealing with subtle conflicts problems and would probably replace adjudication as the primary source of interpretation of the statutory provisions. If the commission had sufficient prestige, the mere publication of its rulings might provide an adequate deterrent to legislative misconduct.³¹⁸

Second, the commission could be authorized to conduct investigations or studies on its own initiative and to issue regulations supplementing statutory provisions. The regulations should be given the force of law, or, in the alternative, the commission could make recommendations to the legislature for reformation or revision of the statute. With such

314. For a noteworthy proposal for an independent state legislative ethics commission, see Rhodes, *supra* note 308, at 396-406. A small step in the right direction is the resolution recently passed by the Pennsylvania House of Representatives granting the house ethics committee authority to issue advisory opinions and initiate investigations. H. Res. 104, General Assembly of Pennsylvania (1973 Sess.), amending H. Rule 47. See Bulletin, *supra* note 286.

315. A private preliminary hearing could be held to determine the merit of the charges before a public hearing is conducted. The private hearing would serve to protect the alleged violator in the event that the complaint was found to be clearly without merit. See Comment, *supra* note 7, at 373-74; Note, *supra* note 5, at 463-64; Note, *supra* note 8, at 457.

316. See Comment, *supra* note 7, at 373-74; Note, *supra* note 5, at 463; Note, *supra* note 8, at 457-58. By recommending further investigation and possible prosecution in certain cases, the commission would serve as an initial screening device, assuring that the criminal law was invoked only when convictions were probable, which is the situation in which criminal sanctions are most appropriate. Comment, *supra* note 7, at 373.

317. Presently, several state statutes provide for the issuance of advisory opinions either by the attorney general or by a legislative ethics committee. See, e.g., CAL. GOV'T CODE § 8955 (West Supp. 1973); LA. REV. STAT. ANN. § 42:1144(E) (7) (Supp. 1973); N.J. REV. STAT. § 52:13D-22(g) (Supp. 1973). Of course, such opinions would merely be legal advice and not authoritative or binding statutory interpretations. Accordingly, the opinions would not be as reliable as judicial determinations, but would probably be much more numerous and extensive and might give direction to judicial determinations.

318. See Buss, *supra* note 5, at 382, 385-86. Comment, *supra* note 7, at 375; Note, *supra* note 5, at 463. Note, *supra* note 9, at 4231-32; Note, *supra* note 8, at 457-58.

power, the commission would provide the impetus for continuing reform of Pennsylvania's legislative conflicts of interest law.³¹⁹

V. CONCLUSION

In enacting the Legislative Code of Ethics, the Pennsylvania general assembly has followed the lead of several other states in adopting a statutory approach to the problem of legislative conflicts of interests. As would be expected, there are many weaknesses in the Code, the most important being the lack of a comprehensive contract prohibition, the failure to provide a more complete section on standards of conduct, and the entrusting of much of the enforcement responsibility to largely fictional legislative ethics committees rather than an independent ethics commission. The Code also contains the usual amount of ambiguity and confusion.

However, there are also several strong points in the Code. First, the general assembly has attacked the legislative conflicts problem directly with a statute which applies solely to legislators and legislative employees. Further, the substantive provisions, particularly the self-dealing prohibition of section 5(c), are outstanding in parts, and, through the express exceptions of section 5(e), generally strike an appropriate balance between the dual objectives of conflicts legislation. Finally, the civil remedies contained in section 7 are substantial and more extensive than those of most other states. On the whole, the general assembly has made a commendable effort in enacting the Code, which, with vigorous enforcement, could go a considerable distance toward the goal of controlling legislative conflicts.†

James A. Shellenberger*

Richard B. Hardt

319. See Krasnow & Lankford, *supra* note 6, at 280-85; Note, *supra* note 9, at 1231-32. Krasnow and Lankford propose that a federal commission or legislative committee should be established for the purpose of devising a statutory code which would be submitted to congress for enactment.

In a few states, the legislative ethics committee is empowered to either recommend legislation or promulgate judicially enforceable regulations or both. See, e.g., LA. REV. STAT. ANN. §§ 42:1144(E)(3) (Supp. 1973); N.Y. LEGIS. LAW § 80(2)(a)(2) (McKinney Supp. 1972).

† After this Comment went to press the Pennsylvania House of Representatives passed a new ethics bill, H. Bill 1306, General Assembly of Pennsylvania (1973 Sess.). The bill is presently under consideration by the Pennsylvania Senate State Government Committee. For a newspaper account see Philadelphia Inquirer, Dec. 4, 1973, at 1A, col. 1.

* Member of the Pennsylvania Bar. B.A., Lafayette College, 1969; J.D., Villanova University, 1972. Mr. Shellenberger is presently an assistant district attorney in the city of Philadelphia.

APPENDIX

Pennsylvania Legislative Code of Ethics

Act of July 10, 1968, P.L. No. 154, [1968] Laws of Pa. 316.

Section 1. Short Title. — This act shall be known and may be cited as the "Legislative Code of Ethics."

Section 2. Legislative Findings and Declaration of Policy. — The General Assembly finds as follows:

(1) Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government.

(2) It is deemed by the General Assembly to be the duty of each member, officer, or employe of the legislative branch to help earn and honor that trust by his own integrity and conduct in all official actions.

(3) Although the vast majority of these public servants are dedicated and serve with high integrity, most of them would welcome a code of ethics to clearly guide them in areas which are not now clearly defined, and

(4) It is the desire of the General Assembly to protect the public confidence in its Legislature, to establish a guide for all legislative members, officers and employes in decisions of personal interest conflicts and to curb any tendencies for exploitation of official position.

Section 3. Definitions. — Unless the context clearly indicates otherwise, the following words and terms when used herein shall have the respective meanings defined as follows:

(1) "Agency" means any department, agency, commission, board, committee, authority or other instrumentality which is created by or under the Constitution or laws of the Commonwealth of Pennsylvania or by executive order, except local political subdivisions or agencies, the majority of the members of whose governing bodies are locally elected or appointed.

(2) "Agency head" and "head of any agency" means the chief executive or administrative officer of each of the State agencies.

(3) "Assist" means to act, or agree to act, in such a way as to help, aid, advise, furnish information to, or otherwise provide assistance to another person believing that such action is of help, aid, advice, or assistance to such person and with intent to so assist such person.

(4) "Compensation" means any thing of economic value, however designated, which is paid, loaned, granted, given, donated or transferred, or to be paid, loaned, granted, given, donated or transferred for or in consideration of personal services to any person, official or to the State.

(5) "Gift," as used in section 5, includes any thing of economic value with the exception of public awards, insignificant nonpecuniary gifts, political contributions for which an accounting is required by and is made pursuant to the election laws, or compensation or gifts not connected with or related to either the legislative processes or the donee's services as a member.

(6) "Member" shall include a Senator, Representative, officer or employe of the General Assembly or any committee thereof; but not a person employed on a contractual basis or without compensation for a particular project.

(7) "State action" means any action on the part of the Commonwealth or a Commonwealth agency, including, but not limited to: (i) any decision, determination, finding, ruling or order, including the judgment or verdict of a court or a quasi-judicial board, in which the Commonwealth or any of its agencies, boards and commissions has an interest, except in such matters, involving criminal prosecutions; (ii) any grant, payment, award, license, contract, transaction, decision, sanction or approval, or the denial thereof, or the failure to act with respect thereto, in which the Commonwealth or any of its agencies has an interest, except in such matters involving criminal prosecutions; (iii) any disposition of any matter by the General Assembly or any committee thereof.

(8) "Participate" in connection with a transaction involving the Commonwealth means to take part in State action or a proceeding personally as a Commonwealth official, through approval, disapproval, decision, recommendation, the rendering of advice, investigation, or the failure to act or perform a duty.

(9) "Person" means: (i) an individual, other than a Commonwealth agency or official; (ii) a partnership, association, corporation, firm, institution, trust, foundation or other legal entity (other than an agency), whether or not operated for profit; (iii) a district, county, municipality or other political subdivision of the State, or any subdivision thereof, provided such is not an agency; (iv) a foreign country or subdivision thereof, or (v) any other entity which is not a Commonwealth agency or official.

(10) "Responsibility" in connection with a transaction involving the Commonwealth means the direct administration or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through or with others or subordinates, to effectively approve, disapprove, fail to act or perform a duty, or otherwise direct State action in respect of such transaction.

(11) "Thing of economic value" means any money or other thing having economic value except food, drink or refreshments consumed by an official including reasonable transportation and entertainment incident thereto, while the personal guest of some person, and includes, without limiting the generality of the foregoing: (i) any loan, except a bona fide loan made by a duly licensed bank or savings and loan association at the normal rate of interest, any property interest, interest in a contract, merchandise, service and any employment or other arrangement involving a right to compensation; (ii) any option to obtain a thing of economic value, irrespective of the conditions to the exercise of such option; and (iii) any promise or undertaking for the present or future delivery or procurement of a thing of economic value.

In the case of an option, promise or undertaking, the time of receipt of the thing of economic value shall be deemed to be, respectively, the time the right to the option becomes fixed, regardless of the conditions to its exercise, and the time when the promise or undertaking is made, regardless of the conditions to its performance.

(12) "Transaction involving the Commonwealth" means any proceeding, application, submission, request for a ruling or other determination, contract, claim, case or other such particular matter which the official in question believes, or has reason to believe: (i) is, or will be, the subject of State action, or (ii) is one to which the Commonwealth is or will be a party, or (iii) is one in which the Commonwealth has a direct interest.

Section 4. Standards of Conduct. — In addition to the other provisions of this act, and in supplement thereto, the following are established as standards of conduct for members. No member shall:

(1) Accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.

(2) Improperly disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

(3) Use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

Section 5. Prohibitions. — (a) No member shall knowingly solicit, accept, or receive any gift or compensation other than that to which he is duly entitled from the Commonwealth which is intended to influence the performance of his official duties or which would influence the performance of his official duties nor shall any member solicit, accept, or receive any such gift or compensation for advocating the passage or defeat of any legislation or for doing any act intended to influence the passage or defeat of legislation including, in the case of a Senator or Representative, his vote thereon.

(b) No member shall receive compensation or any thing of economic value for any consultation, the subject matter of which:

(1) Is devoted substantially to the responsibilities, programs, or operations of the General Assembly, or

(2) Draws substantially upon official data or ideas which have not become part of the body of public information.

(c) No member shall participate as a principal in any transaction involving the Commonwealth or any Commonwealth agency in which he, his spouse or child, or any person of which he is an officer, director, trustee, partner or employe has a substantial personal economic interest as distinguished from that of a general class or general group of persons of which he may reasonably be expected to know.

(d) No member shall receive any compensation or enter into any agreement with any person for compensation for services rendered or to be rendered, for assisting any person in any transaction involving the Commonwealth or any of its officials or agencies unless he shall file with the Chief Clerk of the House of Representatives or Secretary of the Senate, as the case may be, a written statement, giving the following information:

(1) Name and address of member.

(2) The name and address of the person employing or retaining the member to perform such services.

(3) Whether the amount of compensation for services rendered or to be rendered is (i) one thousand dollars (\$1000), or more, or (ii) less than one thousand dollars (\$1000).

(4) A brief description of the transaction in reference to which service is rendered or is to be rendered, and of the nature of the service.

The sworn statement shall be filed with the chief clerk or secretary within ten days from the date such agreement, express or implied, was entered into, or the compensation was received. Such statement of disclosure shall be deemed confidential and privileged and shall only be made public in connection with a public hearing for an alleged violation of this code where such would be relevant to the charges made and for which the member is being tried.

(e) Subsections (a), (b), (c) and (d) of this section 5, shall not apply to:

(1) Receipt of bona fide reimbursement, to the extent permitted by law, for actual expenses for travel and such other necessary subsistence as is compatible with this act and for which no Commonwealth payment or reimbursement is made.

(2) Participation in the affairs of charitable, religious, nonprofit educational, public service or civic organizations, or the activities of national or State political parties not proscribed by law.

(3) Awards for meritorious public contribution given by public service or civic organizations.

(4) Sharing in any compensation received from the Commonwealth or from any political subdivision of the Commonwealth by a person of which such member owns or controls any portion thereof, provided such compensation was received by such person as a result of having made the lowest competitive bid on a Commonwealth contract or subcontract and having had such bid accepted by the Commonwealth or the general contractor, or by reason of an engagement by the Commonwealth in emergency circumstances where dispensation with bidding is permitted by law, and provided such member did not assist in the procurement of the Commonwealth's or the subdivision's or the general contractor's acceptance of such low bid or engagement without bidding.

(5) Campaign contributions for use in meeting campaign expenses by any official who is or becomes a candidate for election to the same or another public office.

(6) Receipt of compensation from the Commonwealth, directly or indirectly, by the member and his immediate family in the

person receiving said compensation is less than ten percent, or (ii) the member or the person in which he has an interest is the exclusive supplier of the real or personal property or service purchased by the Commonwealth, or (iii) the service purchased is newspaper advertising required by law.

(7) Receipt of compensation, directly or indirectly, by a member who is an attorney-at-law, for services in a proceeding where he represents an interest adverse to that of the Commonwealth, where the proceeding is before any court, where the Commonwealth has a right to judicial review in a proceeding not initially before a court, or where the proceeding involves only the uncontested and routine action of administrative officers or employees of the Commonwealth in issuing or renewing a license, charter, certificate or similar document.

(f) No member shall use for private gain any information not available to the public at large and acquired by him solely by virtue of his position.

(g) No information described in subsection (f) of this section 5 shall be disclosed by a member to others for purposes of their use for private gain, in circumstances where the use of such information by the member would violate subsection (f) of this section 5.

Section 6. Penalties. — (a) Any person violating section 5 of this act shall be guilty of a misdemeanor, and upon conviction thereof be sentenced to pay a fine of not more than one thousand dollars (\$1000) and costs and, in default of the payment of such fine and costs, shall undergo imprisonment for not more than two years.

(b) All fines and penalties imposed under the provisions of this section shall be paid into the General Fund of the Commonwealth.

Section 7. Civil Remedies. — (a) Any agency head having final authority to approve or execute a contract between the Commonwealth and a private party may cancel or rescind any such contract without further liability to the Commonwealth where he finds that a violation of this act has influenced the making of said contract; provided, such rescission shall be limited so as not to affect adversely the interests of innocent third parties; and provided further, that no such action shall be initiated before the affirmative finding of the appropriate House or Senate Committee on Ethics that a violation has occurred.

(b) The finding referred to in subsection (a) supra shall be made in accordance with the act of June 4, 1945 (P. L. 1388), as amended, known as the "Administrative Agency Law," and shall be subject to judicial review, provided that the executive officer may suspend the contract pending determination of the merits of the controversy.

(c) The Attorney General may bring a civil action against any member or former member in the judicial district in which said person is domiciled, who shall, to his economic advantage, have acted in violation of this act, to recover on behalf of the Commonwealth an amount equal to such economic advantage, with interest; provided, that no such action shall be brought before the affirmative finding of the appropriate House or Senate Committee on Ethics that a violation has occurred.

(d) No action under subsection (c) of this section 7 shall be commenced after the expiration of two years following the discovery by an agency head or an Ethics Committee of the General Assembly of the occurrence of the alleged violation, or four years after the occurrence of the alleged violation, whichever period is shorter.

(e) The Senator or Representative having responsibility for hiring an employee of the General Assembly may, and if so ordered by the Ethics Committee of his respective house, shall, dismiss, suspend or take such other action as may be appropriate under the circumstances with respect to any employee upon a finding by the Senator or Representative or by said committee that such employee has violated any of the provisions of this act.

Section 8. Severability Clause. — The provisions of this act are severable and if any provision or part thereof shall be held invalid or unconstitutional or inapplicable to any person or circumstances, such invalidity, unconstitutionality or inapplicability shall not affect or impair the remaining provisions of the act.